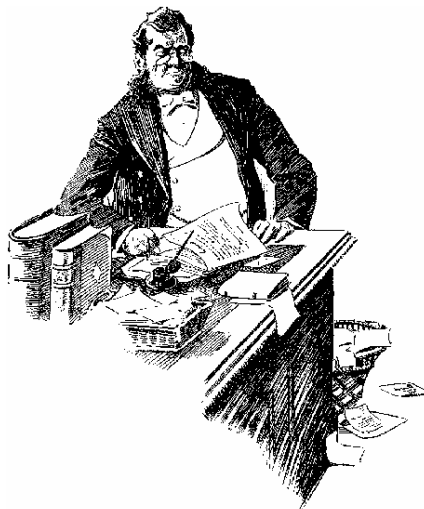
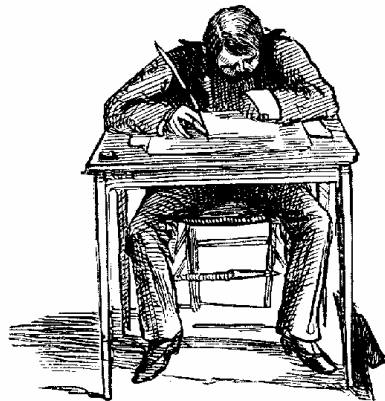


# THE FIFTY-FOURTH GRADUATE COURSE CONTRACT LAW DESKBOOK



## Volume II

Contract and Fiscal Law Department  
The Judge Advocate General's School, United States Army  
Charlottesville, Virginia  
Fall 2005

# REPORT DOCUMENTATION PAGE

Form Approved  
OMB No. 0704-0188

Public reporting burden for this collection of information is estimated to average 1 hour per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden, to Washington Headquarters Services, Directorate for Information Operations and Reports, 1215 Jefferson Davis Highway, Suite 1204, Arlington, VA 22202-4302, and to the Office of Management and Budget, Paperwork Reduction Project (0704-0188), Washington, DC 20503.

1. AGENCY USE ONLY (Leave blank)		2. REPORT DATE 18 January 2006	3. REPORT TYPE AND DATES COVERED	
4. TITLE AND SUBTITLE 54th Graduate Course Contrqact LawDeskbook, Volume II Fall 2005			5. FUNDING NUMBERS	
6. AUTHOR(S) TJGASA, Contract & Fiscal Law Department 600 Massie Road Charlottesville, VA 22903				
7. PERFORMING ORGANIZATION NAME(S) AND ADDRESS(ES) TJAGSA, Contract & Fiscal Law Department 600 Massie Road Charlottesville, VA 22903			8. PERFORMING ORGANIZATION REPORT NUMBER 54th GC Contract Law Deskbook, Volume II, Fall 2005	
9. SPONSORING / MONITORING AGENCY NAME(S) AND ADDRESS(ES) Same as 7.			10. SPONSORING / MONITORING AGENCY REPORT NUMBER Same as 8.	
11. SUPPLEMENTARY NOTES Revised				
12a. DISTRIBUTION / AVAILABILITY STATEMENT A			12b. DISTRIBUTION CODE	
13. ABSTRACT (Maximum 200 words) This revised deskbook introduces contract changes, construction contracting, inspection, acceptance & warranty, contract disputes Act claims, contingency & Deployment contracting, contract terminations for convenience, contract terminations for default, and procurement fraud				
14. SUBJECT TERMS contract changes, construction contracting, inspection, acceptance & warranty, contract disputes Act claims, contingency & Deployment contracting, contract terminations for convenience, contract terminations for default, and procurement fraud			15. NUMBER OF PAGES 310	
			16. PRICE CODE	
17. SECURITY CLASSIFICATION OF REPORT Unclassified	18. SECURITY CLASSIFICATION OF THIS PAGE Unclassified	19. SECURITY CLASSIFICATION OF ABSTRACT Unclassified	20. LIMITATION OF ABSTRACT	

# **54TH GRADUATE COURSE CONTRACT LAW DESKBOOK (VOLUME II)**

## **SUMMARY OF CONTENTS**

SUMMARY OF CONTENTS ..... i

BIOGRAPHIES OF PROFESSORS ..... .iii

### **CHAPTER**

### **TITLE**

13	Contract Changes
14	Construction Contracting
15	Inspection, Acceptance & Warranty
16	Contract Disputes Act Claims
17	Contingency & Deployment Contracting
18	Contract Terminations for Convenience
19	Contract Terminations for Default
20	Procurement Fraud

## **THE JUDGE ADVOCATE GENERAL'S SCHOOL CONTRACT AND FISCAL LAW DEPARTMENT**

### **BIOGRAPHIES OF PROFESSORS**

**LIEUTENANT COLONEL RALPH J. TREMAGLIO, III**, JA, Professor and Chair, Contract and Fiscal Law Department. B.S., Virginia Military Institute, 1985; J.D., Widener University School of Law, 1992; Judge Advocate Officer Basic Course, 1993; LL.M. Military Law, The Judge Advocate General's School, 1999. Career Highlights: Deputy Staff Judge Advocate, U.S. Army Infantry Center, Fort Benning, Georgia, 2003-2005; Command and General Staff College; 2002-2003; Trial Attorney, Contract Appeals Division, 1999-2002; Senior Trial Counsel & Operational Law Attorney, 1<sup>st</sup> Infantry Division, Wurzburg, Germany, 1996-1998; Chief of Claims, U.S. Army Field Artillery Center, Fort Sill, Oklahoma, 1996; Trial Counsel, U.S. Army Field Artillery Center, Fort Sill, Oklahoma, 1994-1996; Legal Assistance Attorney, U.S. Army Field Artillery Center, Fort Sill, Oklahoma, 1993-1994. Member of the Bar of Maryland & District of Columbia; admitted to practice before the U.S. Supreme Court, Court of Federal Claims, Court of Appeals for the Armed Forces.

**MAJ STEVEN R. PATOIR**, JA, Professor and Vice-Chair, Contract and Fiscal Law Department. B.S., State University of New York, College at Plattsburgh, 1987; J.D., University of Buffalo, 1990; Judge Advocate Officer Basic Course, 1992; LL.M., Military Law, The Judge Advocate General's School, 2000. Career Highlights: Deputy Command Counsel; United States Army Contracting Command, Europe, Wiesbaden, Germany, 2001-2003. Chief, Legal Assistance, and Contract and Fiscal Law Attorney; 1<sup>st</sup> Cavalry Division, Fort Hood, Texas, 1997-2000. Administrative Law and Claims Attorney; V Corps, Hanau Field Office, Germany, 1995-1997. Defense Counsel; Hanau Field Office, Germany, 1994-1995. Legal Assistance Attorney; Eighth U.S. Army, Yongsan, Korea, 1993. Members of the Bars of North Carolina, New Jersey and the District of Columbia; admitted to practice before the U.S. Supreme Court and the U.S. Court of Appeals for the Armed Forces.

**MAJOR ANDREW S. KANTNER**, JA, Professor, Contract and Fiscal Law Department. B.S.F.S., Georgetown University School of Foreign Service (cum laude), 1991; J.D., New York University School of Law, 1994; Judge Advocate Officer Basic Course (Distinguished Graduate), 1995; LL.M., Military Law, The Judge Advocate General's School, 2004. Career Highlights: Administrative and Fiscal Law Attorney, 21<sup>st</sup> Theater Support Command, Kaiserslautern, Germany, 2002-2003; Command Judge Advocate, 5<sup>th</sup> Signal Command, Mannheim, Germany, 2000-2002; Chief, Legal Assistance, Mannheim Law Center, Germany, 1999-2000; Defense Counsel, Yongsan Garrison, Korea, 1998-1999; Administrative Law Attorney, Trial Counsel, and Legal Assistance Attorney, 25<sup>th</sup> Infantry Division (Light), Schofield Barracks, Hawaii, 1995-1998. Member of the Bar of New York; admitted to practice before the U.S. Supreme Court, and the U.S. Court of Appeals for the Armed Forces.

**MAJOR MICHAEL S. DEVINE**, JA, Professor, Contract and Fiscal Law Department, B.A., Pennsylvania State University, 1988; J.D., University of Maryland School of Law, (with Honors) 1995; Judge Advocate Officer Basic Course, (Honor Graduate) 1995; LL.M., Military Law, The Judge Advocate General's School, (Honor Graduate) 2005. Career Highlights: Deputy Officer-In-Charge, Northern Law Center, SHAPE (Mons), Belgium, 2002-2004; Trial Defense Counsel, Katterbach, Germany, 2000-2002; Post Tax Officer, III Corps and Fort Hood, Fort Hood, Texas, 2000; Chief of Military Justice, Task Force Eagle, Tuzla, Bosnia-Herzegovina, 1999; Trial Counsel and Senior Trial Counsel, 1<sup>st</sup> Cavalry Division, Fort Hood, Texas, 1997-1999; Administrative and Operational Law Attorney, 1<sup>st</sup> Cavalry Division, Fort Hood Texas, 1996-1997; Business Manager and Staff, Office of the General Counsel, Contracts Branch, National Security Agency, Fort Meade, Maryland, 1991-1995; Construction Supervisor and Sales Manager, Ryan Homes, Baltimore, Maryland, 1988-1991. Member of the Bar of Maryland; admitted to practice before the U.S. Supreme Court, and the U.S. Court of Appeals for the Armed Forces.

**MAJOR MARCI A. LAWSON**, USAF, Professor, Contract and Fiscal Law Department.

B.A., The Ohio State University (summa cum laude) 1992; J.D., University of Toledo College of Law, 1995; Air Force Judge Advocate Staff Officer Course, 1996; Squadron Officer's School, 2001; Air Command and Staff College, 2004; LL.M., Military Law, The Judge Advocate General's School, 2005. Career Highlights: Deputy Staff Judge Advocate, Office of the Staff Judge Advocate, 314th Airlift Wing, Little Rock Air Force Base, Arkansas, 2003-2004; Staff Judge Advocate, 64th Air Expeditionary Wing (Qatar), February-July 2003; Chief of Claims, Office of the Staff Judge Advocate, 314th Airlift Wing, Little Rock Air Force Base, Arkansas, 2001-2002; Area Defense Counsel, Air Force Legal Services Agency, Charleston Air Force Base, South Carolina, 1999-2001; Chief, Adverse Actions, Office of the Staff Judge Advocate, 437th Air Mobility Wing, Charleston Air Force Base, South Carolina, 1998-1999; Chief, Contract and Environmental Law; and Chief, Legal Assistance and Adverse Actions, Office of the Staff Judge Advocate, 27th Fighter Wing, Cannon Air Force Base, New Mexico, 1995-1998. Member of State Bar of Ohio; admitted to practice before the U.S. Court of Criminal Appeals for the Armed Forces.

**MAJOR MICHAEL L. NORRIS**, JA, Professor, Contract and Fiscal Law Department. B.S., Eastern Michigan University (summa cum laude) 1990; J.D., Wayne State University Law School (cum laude), 1993; Judge Advocate Officer Basic Course (Honor Graduate), 1994; LL.M., Military Law, The Judge Advocate General's School, 2003. Career Highlights: Deputy Command Counsel, U.S. Army Contracting Command, Europe, Seckenheim and Wiesbaden, Germany, 2003-2005; Chief, Criminal Law Division and Chief, Administrative Law Division, U.S. Army Special Operations Command, Fort Bragg, North Carolina, 2000-2002; Brigade Judge Advocate, 3d Recruiting Brigade, Fort Knox, Kentucky, 1998-2000; Defense Counsel, Fort Polk, Louisiana 1998; Defense Counsel, Tuzla, Bosnia-Herzegovina, 1997-1998; Operational Law Observer-Controller, Joint Readiness Training Center, Fort Polk, Louisiana, 1996-1997; Trial Counsel, Fort Leonard Wood, Missouri, 1994-1996. Member of the Bar of Michigan; admitted to practice before the U.S. Supreme Court and the U.S. Court of Appeals for the Armed Forces.

**MAJOR JENNIFER C. SANTIAGO**, JA, Professor, Contract and Fiscal Law Department. B.A., University of Michigan, 1991; J.D., St. Thomas University School of Law, 1995; Judge Advocate Officer Basic Course, 1996; LL.M. Military Law, The Judge Advocate General's School, 2005. Career Highlights: Deputy Officer-In-Charge, Patton Law Center, V Corps, Heidelberg, Germany, 2004; Chief, Military Justice, Combined Joint Task Force 7 and V Corps, Baghdad, Iraq, 2003-2004; Senior Trial Counsel, Mannheim Law Center, 21st Theater Support Command, Mannheim, Germany, 2002-2003; Attorney, Military and Civil Law Division, Office of the Judge Advocate, U.S. Army Europe and 7th Army, Heidelberg, Germany, 2000-2002; Assistant Legal Advisor, Office of the NATO Stabilization Force Legal Advisor's Office, Sarajevo, Bosnia-Herzegovina, 2000; Trial Counsel, 2d Armored Cavalry Regiment, 1/509th Parachute Infantry (ABN) and the Operations Group, Joint Readiness Training Center and Fort Polk, Fort Polk, Louisiana, 1998-1999; Contract Law Attorney, and Chief, Administrative Law, Office of the Staff Judge Advocate, Fort Polk, Louisiana, 1996-1998. Member of the Bar of Florida; admitted to practice before the U.S. Supreme Court and the U.S. Court of Appeals for the Armed Forces.

## **BIOGRAPHIES OF RESERVE PROFESSORS**

**MAJOR DANIELLE M. CONWAY (USAR)**, Associate Professor of Law & Director, Hawai'i Procurement Institute, The University of Hawai'i, William S. Richardson School of Law; Of Counsel, Intellectual Property & Government Contracts, Alston Hunt Floyd & Ing, Honolulu, Hawaii; B.S., New York University, Stern School of Business, 1989; J.D. (cum laude), Howard University School of Law, 1992; dual LL.M., Government Procurement Law & Environmental Law, George Washington University Law School, 1996; Judge Advocate Officer Basic Course, 1993; Judge Advocate Officer Advanced Course, 2000; Command General Staff College, 2005. Career Highlights: 2004 University of Hawai'i Regents' Medal Recipient for Excellence in Teaching; 2003-2004 Outstanding Professor of the Year, William S. Richardson School of Law. Assistant Professor of Law, The University of Memphis, Cecil C. Humphreys School of Law, 1998-2000; Instructor of Law, Georgetown University Law Center, 1996-1998; Assistant Counsel for Policy, Information, and Programs, 1995-1996 & Assistant Counsel for Procurement, 1993-1995, Headquarters, U.S. Army Corps of Engineers, Office of the Chief Counsel, Honors Program. Significant publications appear in the Asian Pacific Law & Policy Journal, the Santa Clara Law Review, the University of Richmond Law Review, the Washington University Global Studies Law Review, and the Howard Law Journal. Admitted to the Bars of the Commonwealth of Pennsylvania, the State of New Jersey, the United States District Court for the District of New Jersey, the District of Columbia, the United States Court of Military Review, and the State of Hawai'i (pending).

**MAJOR KATHERINE E. WHITE (USAR)**, Associate Professor of Law, Wayne State University Law School. B.S.E. Princeton University, 1988; J.D., University of Washington, 1991, LL.M., Intellectual Property Law, George Washington University Law School, 1996. After graduating from law school, Major White served on active duty in the U.S. Army Corps of Engineers, Office of the Chief Counsel's Honors Program. After leaving active duty, she clerked for the Honorable Randall R. Rader, Circuit Judge for the United States Court of Appeals for the Federal Circuit. She received the Fulbright Senior Scholar Award for 1999-2000, hosted by the Max Planck Institute for Foreign and International Patent, Copyright, and Competition Law in Munich, Germany. Elected in November 1998, Major White currently serves as a member of the University of Michigan Board of Regents. Major White served on the United States Patent and Trademark Patent Public Advisory Committee from 2000-2002. From 2001-2002, Major White served as a White House Fellow, serving as Special Counsel to the Secretary of Agriculture, Ann M. Veneman.

**MAJOR STEVEN L. SCHOONER (USAR)**, Associate Professor and Co-Director of the Government Procurement Law Program, George Washington University School of Law. Previously: Associate Administrator for Procurement Law and Legislation, Office of Federal Procurement Policy (OFPP); Trial Attorney, Commercial Litigation Branch, Department of Justice; Commissioner, Armed Services Board of Contract Appeals; practice with private law firms. B.A. from Rice University, J.D. from the College of William and Mary, and LL.M. from the George Washington University. Adjunct Professor, Contract and Fiscal Law Department, The Judge Advocate General's School. Fellow and Member of the Board of Advisors of the National Contract Management Association (NCMA); Certified Professional Contracts Manager (CPCM); Faculty Advisor, the American Bar Association's Public Contract Law Journal; Editorial Board, Public Procurement Law Review (UK); and Advisory Board, The Government Contractor. Co-author (with Professor Ralph C. Nash, Jr.) of The Government Contracts Reference Book: A Comprehensive Guide To The Language of Procurement (published by George Washington University, 2d ed., 1998; 1st ed., 1992).



**CHAPTER 13**  
**CONTRACT CHANGES**

I. INTRODUCTION.....	1
II. FORMAL CONTRACT CHANGES.....	1
A. Types of Formal Changes.....	1
B. Modifying a Contract.....	2
C. Prerequisites for Formal Changes.....	2
III. CHANGES CLAUSE COVERAGE. ....	3
A. Purpose of the Clause. ....	3
B. Limitations. ....	3
C. Scope Determinations. ....	3
D. Scope Determination Factors.....	4
E. The Duty to Continue Performance. ....	7
IV. OVERVIEW OF CONSTRUCTIVE CHANGES.....	8
A. Elements of a Constructive Change.....	8
B. Types of Constructive Changes. ....	9
V. CONTRACT INTERPRETATION PRINCIPLES.....	9
A. Main Issues .....	9
B. Contract Interpretation Process.....	10
C. Intrinsic Evidence of Intent.....	10
D. Extrinsic Evidence of Intent. ....	13
E. Allocation of Risk for Ambiguous Language .....	16



VI. DEFECTIVE SPECIFICATIONS - OVERVIEW .....	18
A. Theories of Recovery.....	18
B. Causation.....	18
VII. DEFECTIVE SPECIFICATIONS - IMPLIED WARRANTY OF SPECIFICATIONS.....	18
A. Basis for the Implied Warranty.....	18
B. Specification Types.....	19
C. Scope of Government Liability.....	19
D. Recovery under the Implied Warranty of Specifications .....	21
VIII. DEFECTIVE SPECIFICATIONS - IMPRACTICABILITY/IMPOSSIBILITY OF PERFORMANCE .....	23
IX. INTERFERENCE AND FAILURE TO COOPERATE .....	25
A. Theory of Recovery .....	25
B. Bases for Interference Claims.....	26
C. Bases for Failure to Cooperate Claims .....	26
X. FAILURE TO DISCLOSE VITAL INFORMATION (SUPERIOR KNOWLEDGE).....	28
A. Theory.....	28
B. Elements of the Implied Duty to Disclose Vital Information .....	28
XI. CONSTRUCTIVE ACCELERATION. ....	30
A. Theory of Recovery. ....	30
B. Elements of Constructive Acceleration .....	30
C. Actions That May Lead to Constructive Acceleration. ....	30
D. Measure of Damages. ....	31

XII. NOTICE REQUIREMENTS. ....	32
A. Notice of an Equitable Adjustment by the Contractor.....	32
B. Notice of an Equitable Adjustment by the Government.....	34
XIII. ANALYZING CHANGES ISSUES.....	34
XIV. CONCLUSION.....	35
APPENDIX A: CHANGES CLAUSE (SUPPLIES), FAR 52.243-1 .....	37
APPENDIX B: CHANGES CLAUSE (SERVICES) FAR 52.243-1 (ALTERNATE I) .....	39
APPENDIX C: CHANGES CLAUSE (CONSTRUCTION ) FAR 52.243-4.....	41
APPENDIX D: STANDARD FORM (SF) 30, AMENDMENT OF SOLICITATION/ MODIFICATION OF CONTRACT.....	43



## **CHAPTER 13**

### **CONTRACT CHANGES**

#### **I. INTRODUCTION.** Following this instruction, the student will understand:

- A. How to analyze change issues arising in government contracts.
- B. How to make formal changes to government contracts.
- C. How to recognize constructive changes in government contracts, and to resolve constructive change issues.

#### **II. FORMAL CONTRACT CHANGES.**

- A. Types of Formal Changes.
  - 1. Administrative change. A unilateral written change that does not affect the substantive rights of the parties. FAR 43.101. Example: a change in paying office or a change in telephone number for an agency point of contact.
  - 2. Change order. A unilateral, written order, signed by the contracting officer, directing the contractor to make a change that a Changes clause authorizes, with or without the contractor's consent. FAR 43.101.
  - 3. Bilateral modification (supplemental agreement). A contract modification signed by the contractor and the contracting officer. FAR 43.103(a). Bilateral modifications are used for:
    - a. Negotiating equitable adjustments that result from the issuance of a change order;
    - b. Definitizing a letter contract; and

- c. Reflecting other agreements of the parties affecting the terms of a contract.

B. Modifying a Contract.

1. Only contracting officers acting within the scope of their authority may execute contract modifications. FAR 43.102; Hensel Phelps Constr. Co., GSBCA Nos. 14744, 14877, 01-1 BCA ¶ 31,249; Daly Constr., Inc., ASBCA No. 34322, 92-1 BCA ¶ 24,469; Commercial Contractors, Inc., ASBCA No. 30675, 88-3 BCA ¶ 20,877.
2. Contracting officers should issue modifications on SF 30, Amendment of Solicitation/Modification of Contract. FAR 43.102; FAR 43.301; Staff, Inc., AGBCA Nos. 96-112-1, 96-159-1, 97-2 BCA ¶ 29,285 (oral modifications are unenforceable); Texas Instr., Inc. v. United States, 922 F.2d 810 (Fed. Cir. 1990); Daly Constr., Inc., ASBCA No. 34322, 92-1 BCA ¶ 24,469; but see Robinson Contracting Co. v. United States, 16 Cl. Ct. 676 (1989) (SF 30 **not** required). A copy of an SF30 is provided at Appendix D.
3. The contracting officer must price modifications before executing them if this can be done without adversely affecting the interests of the government. If the price cannot be negotiated prior to execution, negotiate a maximum price. FAR 43.102(b).
4. The contracting officer may order a change at any time prior to final payment. Final payment means payment in the full amount of the contract balance owed, received, and accepted by the contractor after delivery of supplies or the performance of services, with the understanding that no further payments are due. Design & Prod., Inc. v. United States, 18 Cl. Ct. 168 (1989); Gulf & Western Indus., Inc. v. United States, 6 Cl. Ct. 742 (1984).

C. Prerequisites for Formal Changes.

1. The government must receive a benefit. G. Issaias & Co. (Kenya), ASBCA No. 30359, 88-1 BCA ¶ 20,441.

2. Proper funds must be available. FAR 43.105; DOD 7000.14-R, vol. 3, ch. 8, para. 080304.C-E; DFAS-IN Reg. 37-1, tbl. 8-7; AFI 65-601, vol. I, para. 6.3.7 and Figure 6.1.

### III. CHANGES CLAUSE COVERAGE.

#### A. Purpose of the Clause.

#### B. Limitations.

1. The change must be of a type specified in the Changes clause.
2. The change must be within the general scope of the contract.

#### C. Scope Determinations.

1. In a protest action, the test used by the GAO and the COFC is whether the change so materially altered the contract that the field of competition for the contract as modified would be significantly different from that obtained for the original contract (scope of competition). AT&T Communications, Inc. v. Wiltel, Inc., 1 F.3d 1201, 1205 (Fed. Cir. 1993) (holding a modification falls within the scope of the original procurement if potential offerors would have reasonably anticipated such prior to initial award); Phoenix Air Group, Inc. v. U.S., 46 Fed. Cl. 90 (2000); Engineering & Professional Svcs., Inc., B-289331, 2002 U.S. Comp. Gen. LEXIS 11; L-3 Communications Aviation Recorders, B-281114, Dec. 28, 1998, 99-1 CPD ¶ 18; Hughes Space and Communications, Co., B276040, 97-1 CPD ¶ 158.
2. In Hughes Space and Communications, Co., B-276040, 97-1 CPD ¶ 158, the following factors were considered in determining whether the modification was in-scope:
  - a. The extent of any changes in the type of work or the performance period, or the difference in costs between the contract as awarded and as modified;

- b. Whether the agency had historically procured the services under a separate contract; and
  - c. Whether potential offerors would have anticipated the modification.
3. In a contract dispute, the test used by courts and boards is whether the contract, as modified, “should be regarded as having been fairly and reasonably within the contemplation of the parties when the contract was entered into.” Freund v. United States, 260 U.S. 60 (1922); Air-A-Plane Corp. v. United States, 408 F.2d 1030 (Ct. Cl. 1969); GAP Instrument Corp., ASBCA No. 51658, 01-1 BCA ¶ 31,358; Gassman Corp., ASBCA Nos. 44975, 44976, 00-1 BCA ¶ 30,720.

D. Scope Determination Factors.

- 1. Changes in the Function of the Item or the Type of Work.
  - a. In determining the materiality of a change, the most important factor to consider is the extent to which a product or service, as changed, differs from the requirements of the original contract. See E. L. Hamm & Assocs., Inc., ASBCA No. 43792, 94-2 BCA ¶ 26,724 (change from lease to lease/purchase was out-of-scope); Matter of: Makro Janitorial Servs., Inc., B-282690, Aug. 18, 1999, 99-2 CPD ¶ 39 (task order for housekeeping outside scope of an IDIQ contract for preventive maintenance); Hughes Space and Communications Co., B-276040, May 2, 1997, 97-1 CBD ¶ 158; Aragona Constr. Co. v. United States, 165 Ct. Cl. 382 (1964).

- b. Substantial changes in the work may be in-scope if the parties entered into a broadly conceived contract. AT&T Communications, Inc. v. Wiltel, Inc., 1 F.3d 1201 (Fed. Cir. 1993) (more latitude allowed where the activity requires a state-of-the-art product); Engineering & Professional Svcs., Inc., B-289331, 2002 U.S. Comp. Gen. LEXIS 11 (provision of technologically advanced, ruggedized, handheld computers was not beyond the scope of the original contract that called for a wide array of hardware and software and RFP indicated the Engineering Change Proposal process would be utilized to implement technological advances); Paragon Sys., Inc., B-284694.2, 2000 CPD ¶ 114 (contract awarded for broad range of services given wide latitude when issuing a task order); Gen. Dynamics Corp. v. United States, 585 F.2d 457 (Ct. Cl. 1978).
- c. An agency's preaward statements that certain work was outside the scope of the contract can bind the agency if it later attempts to modify the contract to include the work. Octel Communications Corp. v. Gen. Servs. Admin., GSBICA No. 12975-P, 95-1 BCA ¶ 27,315.

## 2. Changes in Quantity.

- a. Increases and decreases in the quantity of major items or portions of the work are not "within the scope" of a contract. See, e.g., Valley Forge Flag Co., Inc., VABCA Nos. 4667, 5103, 97-2 BCA ¶ 29,246; Liebert Corp., B-232234.5, Apr. 29, 1991, 91-1 CPD ¶ 413 (order in excess of maximum quantity was a material change). But see Master Security, Inc., B-274990, Jan. 14, 1997, 97-1 CPD ¶ 21 (tripling the number of work sites not out-of-scope change); Caltech Serv. Corp., B-240726.6, Jan. 22, 1992, 92-1 CPD ¶ 94 (increase in cargo tonnage on containerization requirements contract was within scope). Generally, increases are new procurements, and decreases are partial terminations for convenience. Cf. Lucas Aul, Inc., ASBCA No. 37803, 91-1 BCA ¶ 23,609 (order was deductive change, not partial termination).



- b. Generally, the Changes clause permits increases and decreases in the quantity of minor items or portions of the work unless the variation alters the entire bargain. See Symbolic Displays, Inc., B-182247, May 6, 1975, 75-1 CPD ¶ 278 (addition of strobe lights to aircraft manufacturing contract was not an “evident” out-of-scope change). Cf. Lucas Aul, Inc., ASBCA No. 37803, 91-1 BCA ¶ 23,609. See also Kentucky Bldg. Maint., Inc., ASBCA No. 50535, 98-2 BCA ¶ 29,846 (holding that agency clause that supplements the standard Changes clause was not illegal).

### 3. Number and Cost of Changes.

- a. Neither the number nor the cost of changes alone dictates whether modifications are beyond the scope of a contract. PCL Constr. Serv., Inc. v. United States, 47 Fed. Cl. 745 (2000) (series of contract modifications did not constitute cardinal change); Triax Co. v. United States, 28 Fed. Cl. 733 (1993); Reliance Ins. Co. v. United States, 20 Cl. Ct. 715 (1990), *aff’d*, 931 F.2d 863 (Fed. Cir. 1991) (over 200 changes still held to be within scope); Coates Indus. Piping, Inc., VABCA No. 5412, 99-2 BCA ¶ 30,479; Combined Arms Training Sys., Inc., ASBCA Nos. 44822, 47454, 96-2 BCA ¶ 28,617; Bruce-Andersen Co., ASBCA No. 35791, 89-2 BCA ¶ 21,871.
- b. However, the cumulative effect of a large number of changes is controlling. Air-A-Plane Corp. v. United States, 408 F.2d 1030 (Ct. Cl. 1969) (dispute involving over 1,000 changes sent back for trial on merits).

### 4. Changes in Time of Performance.

- a. The supply Changes clause does not authorize unilateral acceleration of performance. FAR 52.243-1 (found at Appendix A).
- b. Under the services Changes clause, the contracting officer unilaterally may change “when” a contractor is to perform but not the overall performance period. FAR 52.243-1, Alternate I (found at Appendix B).

- c. The construction Changes clause authorizes unilateral acceleration of performance. FAR 52.243-4(a)(4) (found at Appendix C).
- d. Granting a contractor additional time to perform will normally be considered within scope. Saratoga Indus., Inc., B-247141, 92-1 CPD ¶ 397.

5. Acceptance of a Change.

- a. If a contractor performs under a change order, it may not subsequently argue that the change constituted a breach of contract. Ameritex Enter., Ltd. v. United States, 1997 U.S. App. LEXIS 3301 (Fed. Cir. 1997), *cert. denied*, 522 U.S. 1075 (1998); Silberblatt & Lasker, Inc. v. United States, 101 Ct. Cl. 54 (1944); C.E. Lowther & Son, ASBCA No. 26760, 85-2 BCA ¶ 18,149. Similarly, once the contractor waives the breach and performs, the Government is obligated to pay for the out-of-scope work. Mac-Well Co., ASBCA No. 23097, 79-2 BCA ¶ 13,895.
- b. Agreeing to a change does not convert an out-of-scope change into one that is within the scope of the contract for competition purposes; it simply means that the parties have agreed to process the change under the Changes clause. The contracting officer may not use modifications to avoid the statutory mandate for competition. Corbin Superior Composites, Inc., B-235019, July 20, 1989, 89-2 CPD ¶ 67.

E. The Duty to Continue Performance.

- 1. The Changes and Disputes (Standard) clauses require the contractor to continue performance pending the resolution of a dispute over an **in-scope change**. See FAR 52.233-1, Disputes; FAR 52.243-1(e), Changes-Fixed Price; see also FAR 33.213.
- 2. Conversely, under the standard Disputes clause, a contractor has no duty to proceed diligently with performance pending resolution of any dispute concerning a change **outside the scope** of the contract (cardinal change). FAR 52.233-1(h). Alliant Techsys., Inc. v United States, 178 F.3d 1260 (Fed. Cir. 1999); CTA Inc., ASBCA No. 47062, 00-2 BCA ¶ 30,947; Airprep Tech., Inc. v. United States, 30 Fed. Cl. 488 (1994).

3. Exceptions to the duty to proceed.
  - a. The government withholds progress payments improperly. Sterling Millwrights v. United States, 26 Cl. Ct. 49 (1992). But see D.W. Sandau Dredging, ENG BCA No. 5812, 96-1 BCA ¶ 28,064 (holding two late payments of 12 days and 19 days did not discharge the contractor from its duty to continue performance where contractor did not demonstrate the late payments had impacted its ability to perform).
  - b. Continued performance is impractical. United States v. Spearin, 248 U.S. 132 (1918) (government refused to provide safe working conditions); Xplo Corp., DOT BCA No. 1289, 86-3 BCA ¶ 19,125.
  - c. The government fails to provide clear direction to the contractor. James W. Sprayberry Constr., IBCA No. 2130, 87-1 BCA ¶ 19,645 (contractor justified to await clarification of defective specifications). Cf. Starghill Alternative Energy Corp., ASBCA Nos. 49612, 49732, 98-1 BCA ¶ 29,708 (a one-month Government delay in executing modification did not excuse contractor from proceeding).
4. The Alternate Disputes clause requires the contractor to continue to perform even if the government orders a cardinal change, or otherwise breaches the contract. See FAR 52.233-1, Alternate I. See also DFARS 233.215 (mandating use of this alternate clause under certain circumstances).

#### IV. OVERVIEW OF CONSTRUCTIVE CHANGES.

- A. Elements of a Constructive Change. The Sherman R. Smoot Corp., ASBCA Nos. 52173, 53049, 01-1 BCA ¶ 31,252; Green's Multi-Services, Inc., EBCA No. C-9611207, 97-1 BCA ¶ 28,649; Dan G. Trawick III, ASBCA No. 36260, 90-3 BCA ¶ 23,222.
  1. A change occurred either as the result of government action or inaction. Kos Kam, Inc., ASBCA No. 34682, 92-1 BCA ¶ 24,546;

2. The contractor did not perform voluntarily. Jowett, Inc., ASBCA No. 47364, 94-3 BCA ¶ 27,110; and
3. The change resulted in an increase (or a decrease) in the cost or the time of performance. Advanced Mech. Servs., Inc., ASBCA No. 38832, 94-3 BCA ¶ 26,964.

B. Types of Constructive Changes:

1. Contract misinterpretation by the government;
2. Defective specifications;
3. Interference and failure to cooperate;
4. Failure to disclose vital information (superior knowledge); and
5. Constructive acceleration.

**V. CONTRACT INTERPRETATION PRINCIPLES.**

- A. Main Issues. Ralph C. Nash, Jr., Government Contract Changes, 11-2 (2d ed. 1989).
1. Did the government's interpretation originate from an employee with authority? See J.F. Allen Co. & Wiley W. Jackson Co., a Joint Venture v. United States, 25 Cl. Ct. 312 (1992).
  2. Did the contractor perform work that the contract did not require?
  3. Did the contractor timely notify the government of the impact of the government's interpretation?

B. Contract Interpretation Process.

1. A judge must interpret a contract when the parties do not agree on the meaning of its terms. Fruin-Colon Corp. v. United States, 912 F.2d 1426 (Fed. Cir. 1990).
2. Framework for analyzing contract interpretation issues.
  - a. Seek the intent of the parties by examining:
    - (1) The language of the contract; and/or
    - (2) The facts and circumstances surrounding contract formation and performance.
  - b. If this process fails to reveal the objective intent of the parties, apply the two rules of risk allocation: contra proferentem and the duty to seek clarification.
3. The contractor must continue performance even if it does not agree with the contracting officer's interpretation, absent a material breach. See FAR 52.233-1, Disputes; Aero Prods. Co., ASBCA No. 44030, 93-2 BCA ¶ 25,868.

C. Intrinsic Evidence of Intent.

1. In determining the objective intent of the parties, first examine the terms of the contract. See, e.g., U.S. Eagle, Inc., ASBCA No. 41093, 92-1 BCA ¶ 24,371.

2. Interpret the contract as a whole. Coast Federal Bank, FSB v. United States, 02-5032, (Ct. App. Fed. Cir. Mar. 24, 2003); M.A. Mortenson Co. v. United States, 29 Fed. Cl. 82 (1993) (courts must give reasonable meaning to all parts of the contract and not render any portions of the contract meaningless); Hol-Gar Mfg. Corp. v. United States, 351 F.2d 972 (Ct. Cl. 1965); Bay Ship & Yacht Co., DOT BCA No. 2913, 96-1 BCA ¶ 28,236 (contract must be read as a whole, giving reasonable meaning to all its terms); Sheladia Constr. Corp., VABCA No. 3313, 91-3 BCA ¶ 24,111 (contractor may not ignore requirement merely because it is not stated in normal section of the specifications). Oakland Constr. Co., ASBCA No. 43986, 93-2 BCA ¶ 25,867 (prime contractor responsible for omission in bid caused by subcontractor's failure to bid on contract requirement because subcontractors only received portion of specification from prime contractor).
  - a. Give effect to all provisions and do not render meaningless any term of the contract. GPA-I, Ltd. P'ship. v. United States, 46 Fed. Cl. 762 (2000); B.D. Click Co. v. United States, 614 F.2d 748 (Ct. Cl. 1980); Jamsar, Inc. v. United States, 442 F.2d 930 (Ct. Cl. 1971); Rex Sys., Inc., ASBCA No. 45874, 94-1 BCA ¶ 26,370; Elec. Genie, Inc., ASBCA No. 40535, 93-1 BCA ¶ 25,307.
  - b. Interpret a contract in harmony with its principal purpose. Maddox Indus. Contractors, Inc., ASBCA No. 36091, 88-3 BCA ¶ 21,037; Restatement (Second) of Contracts § 203(a) (1981).
3. How to define terms.
  - a. If contract defines a term, one may not substitute an alternate definition. Sears Petroleum & Transp. Corp., ASBCA No. 41401, 94-1 BCA ¶ 26,414.
  - b. Give ordinary terms their plain and ordinary meaning in defining the rights and obligations of the parties. T.E.C. Constr. v. VA Med. Ctr., 33 Fed. Cl. 363 (1995); Elden v. United States, 617 F.2d 254 (Ct. Cl. 1980); Alive & Well Int'l, Inc., ASBCA No. 51850, 00-1 BCA ¶ 30,778 (since contract left the term "discover" undefined, interpret in accordance with the ordinary meaning).

c. Give technical terms their technical meanings. Specialized or trade meanings take precedence over “lay” meanings. See Western States Constr. Co. v. United States, 26 Cl. Ct. 818 (1992).

(1) Give scientific and engineering terms their recognized technical meanings unless the context or an applicable usage indicates a contrary intention. American Mechanical, Inc., ASBCA No. 52033, 03-1 BCA ¶ 32,134; Tri-Cor, Inc. v. United States, 458 F.2d 112 (Ct. Cl. 1972); Coastal Drydock & Repair Corp., ASBCA No. 31894, 87-1 BCA ¶ 19,618.

(2) Similarly, give terms unique to government contracts their technical meanings. Gen. Builders Supply Co. v. United States, 409 F.2d 246 (Ct. Cl. 1969) (meaning of “equitable adjustment”).

4. Lists of items.

a. Lists are presumed exclusive unless qualified. J.A. Jones Constr. Co., ENG BCA No. 6164, 95-1 BCA ¶ 27,482; Santa Fe Engr’s, Inc., ASBCA No. 48331, 95-1 BCA ¶ 27,505.

b. Nonexclusive lists are presumed to include only similar, unspecified items. “Words, like men, are known by the company they keep. The meaning of a doubtful word may be ascertained by reference to the meaning of words with which they are associated.” C.W. Roberts Constr. Co., ASBCA No. 12348, 68-1 BCA ¶ 6819. See also United States v. Turner Constr. Co., 819 F.2d 283 (Fed. Cir. 1987) (unreasonable to include unmentioned item in a list where unmentioned item was most expensive component).

5. Order of precedence.

a. To resolve inconsistencies, order of precedence clauses establish priorities among different sections of the contract. See, e.g., FAR 52.214-29, Order of Precedence-Sealed Bidding; FAR 52.215-8, Order of Precedence – Uniform Contract Format; FAR 52.236-21, Specifications and Drawings for Construction.

- b. In construction contracts, a contractor may rely on the order of precedence clause to resolve a discrepancy between the specifications and drawings even if a discrepancy is patent or known to the contractor prior to bid submission. Hensel Phelps Constr. Co. v. United States, 886 F.2d 1296 (Fed. Cir. 1989); C Constr. Co., ASBCA No. 38098, 91-2 BCA ¶ 23,923; Hull-Hazard, Inc., ASBCA No. 34645, 90-3 BCA ¶ 23,173. See also Shah Constr. Co. Inc., ASBCA No. 50411, 01-1 BCA ¶ 31,330.
- c. Omissions. In construction contracts, the DFARS states that the contractor shall perform omitted details of work that are necessary to carry out the intent of the drawings and specifications or that are performed customarily. DFARS 252.236-7001; M.A. Mortenson Co., ASBCA No. 50383, 00-2 BCA ¶ 30,936 (holding that contractor should have known elevator would require rail support columns despite their omission from drawings); Single Ply Sys., Inc., ASBCA No. 42168, 91-2 BCA ¶ 24,032; Hull-Hazard, Inc., ASBCA No. 34645, 90-3 BCA ¶ 23,173.
- d. If the order of precedence clauses do not resolve the inconsistency, the common law rule is that a specific term takes precedence over a general term. Restatement (Second) of Contracts, § 203 (1981).

D. Extrinsic Evidence of Intent.

1. Do not consider extrinsic evidence if the contract terms are clear. See Coast Federal Bank, FSB v. United States, 02-5032, (Ct. App. Fed. Cir. Mar. 24, 2003); C. Sanchez & Son, Inc. v. United States, 24 Cl. Ct. 14 (1991), rev'd on other grounds, 6 F.3d 1539 (Fed. Cir. 1993); D&L Constr. Co., AGBCA No. 97-205-1, 00-1 BCA ¶ 31,001; Skyline Technical Constr. Servs., ASBCA No. 51076, 98-2 BCA ¶ 29,888 (since contract was clear, no extrinsic evidence allowed).



2. Preaward communications.
  - a. The Explanation to Prospective Offerors clause does not prevent parties from using clarifying statements by “authorized” officials to interpret an ambiguous provision. FAR 52.214-6 (sealed bidding); Max Drill, Inc. v. United States, 192 Ct. Cl. 608, 427 F.2d 1233 (1970); Turner Constr. Co. v. Gen. Servs. Admin., GSBICA No. 11361, 92-3 BCA ¶ 25,115 (contractor could not rely on preaward statement that was inconsistent with terms of solicitation); Community Heating & Plumbing Co., ASBCA No. 37981, 92-2 BCA ¶ 24,870.
  - b. Statements made at pre-bid conferences may bind the government. Cessna Aircraft Co., ASBCA No. 48118, 95-2 BCA ¶ 27,560; Gen. Atronics Corp., ASBCA No. 46784, 94-3 BCA ¶ 27,112. Cf. Orbas & Assoc., ASBCA No. 33359, 87-2 BCA ¶ 19,742 (contractor who did not attend pre-bid conference was not bound by explanation of provision where solicitation should have explained provision).
  - c. Preaward acceptance of contractor’s cost-cutting suggestion was binding on the government. See Pioneer Enters., Inc., ASBCA No. 43739, 93-1 BCA ¶ 25,395.
3. Actions during contract performance. The way in which the parties comport themselves often reveals the intent of the parties. Courts and boards afford these actions great weight when determining the meaning of a provision. Drytech, Inc., ASBCA No. 41152, 92-2 BCA ¶ 24,809; Macke Co. v. United States, 467 F.2d 1323 (Ct. Cl. 1972).
4. Prior course of dealing.
  - a. To determine the meaning of the current contract, consider a prior course of dealing between the parties in earlier contracts. Superstaff, Inc., ASBCA No. 46112, 94-1 BCA ¶ 26,574; American Transp. Line, Ltd., ASBCA No. 44510, 93-3 BCA ¶ 26,156; L.W. Foster Sportswear Co. v. United States, 405 F.2d 1285 (Ct. Cl. 1969).

- b. The parties must be aware of the prior course of dealing. Gresham & Co. v. United States, 470 F.2d 542 (Ct. Cl. 1972); T. L. Roof & Assocs., ASBCA No. 38928; 93-2 BCA ¶ 25,895; Snowbird Indus., ASBCA No. 33027, 89-3 BCA ¶ 22,065.
- c. Prior waivers of specifications must be numerous or consistent to vary an unambiguous term. Doyle Shirt Mfg. Corp., 462 F.2d 1150 (Ct. Cl. 1972); Cape Romain Contractors, Inc., ASBCA Nos. 50557, 52282, 00-1 BCA ¶ 30,697 (one waiver does not establish a course of dealing); Kvaas Constr. Co., ASBCA No. 45965, 94-1 BCA ¶ 26,513 (four waivers not enough); Gen. Sec. Servs. Corp. v. Gen. Servs. Admin., GSBGA No. 11381, 92-2 BCA ¶ 24,897 (no waiver based on waivers in six previous contracts because GSA sought to enforce requirement in current contract).

5. Custom or trade usage/industry standard.

- a. Parties may not use custom and trade usage to contradict unambiguous terms. WRB Corp. v. United States, 183 Ct. Cl. 409, 436 (1968); C. Sanchez & Son, Inc. v. United States, 24 Cl. Ct. 14 (1991), rev'd on other grounds, 6 F.3d 1539 (Fed. Cir. 1993); All Star / SAB Pacific, J.V., ASBCA No. 50856, 99-1 BCA ¶ 30,214; Riley Stoker Corp., ASBCA No. 37019, 92-3 BCA ¶ 25,143 (contract terms were ambiguous); Harold Bailey Painting Co., ASBCA No. 27064, 87-1 BCA ¶ 19,601 (used to define “spot painting”).
- b. Parties may resort to custom and trade usage to explain or define unambiguous terms. W.G. Cornell Co. v. United States, 376 F.2d 299 (Ct. Cl. 1967).
- c. Parties also may use an industry standard or trade usage to show that a term is ambiguous. See Metric Constr., Inc. v. Nat'l Aeronautics and Space Admin., 169 F.3d 747 (Fed. Cir. 1999) (contractor reasonably relied on trade practice and custom to show that the specifications were susceptible to different interpretations); Gholson, Byars, & Holmes Constr. Co. v. United States, 351 F.2d 987 (Ct. Cl. 1965); Western States Constr. Co. v. United States, 26 Cl. Ct. 818 (1992).

- d. The party asserting the industry standard or trade usage bears the burden of proving the existence of the standard or usage. Roxco, Ltd., ENG BCA No. 6435, 00-1 BCA ¶ 30,687; DWS, Inc., Debtor in Possession, ASBCA No. 29743, 93-1 BCA ¶ 25,404.

E. Allocation of Risk for Ambiguous Language.

If a contract is susceptible to more than one reasonable interpretation after application of the aforementioned rules, it contains an ambiguity. GPA-I, Ltd. P'ship. v. United States, 46 Fed. Cl. 762 (2000); Metric Constr., Inc. v. Nat'l Aeronautics and Space Admin., 169 F.3d 747 (Fed. Cir. 1999). It is then necessary to apply risk allocation principles to determine which party is ultimately responsible. The risk allocation principles do not apply to ambiguities in procurement regulations. Santa Fe Eng'rs, Inc. v. United States, 801 F.2d 379 (Fed. Cir. 1986).

1. Contra proferentem. Peter Kiewit Sons' Co. v. United States, 109 Ct. Cl. 390 (1947).
  - a. If one cannot resolve an ambiguity under the contract interpretation rules, construe the ambiguity against the drafter. Emerald Maint., Inc., ASBCA No. 33153, 87-2 BCA ¶ 19,907; WPC Enter. v. United States, 323 F.2d 874 (Ct. Cl. 1963).
  - b. “[Contra proferentem] puts the risk of ambiguity, lack of clarity, and absence of proper warning on the drafting party which could have forestalled the controversy; it pushes the drafters toward improving contractual forms; and it saves contractors from hidden traps not of their own making.” Sturm v. United States, 421 F.2d 723 (Ct. Cl. 1970).
  - c. Elements of the rule.
    - (1) To recover, the contractor’s interpretation must be reasonable. Teague Bros. Transfer & Storage Co., Inc., ENG BCA Nos. 6312, 6313, 98-1 BCA ¶ 29,333 (the board decided that the contractor’s interpretation of the latent ambiguity was reasonable); J.C.N. Constr. Co., ASBCA No. 42263, 91-3 BCA ¶ 24,095 (contractor interpretation unreasonable);

- (2) The opposing party must be the drafter. This is usually the government, but a contractor may also be the drafter. See Canadian Commercial Corp. v. United States, 202 Ct. Cl. 65 (1973); TRW, Inc., ASBCA No. 27299, 87-3 BCA ¶ 19,964; Prince George Ctr., Inc. v. Gen. Servs. Admin., GSBCA No. 12289, 94-2 BCA ¶ 26,889; and
- (3) The non-drafting party must have detrimentally relied on its interpretation in submitting its bid. Fruin-Colon Corp. v. United States, 912 F.2d 1426 (Fed. Cir. 1990); National Med. Staffing, Inc., ASBCA No. 45046, 96-2 BCA ¶ 28,483 (for contra proferentem to apply, the contractor must demonstrate that it relied upon the interpretation in submitting its bid, not merely that it relied during performance); Food Servs., Inc., ASBCA No. 46176, 95-2 BCA ¶ 27,892.

## 2. Duty to seek clarification.

- a. Do not apply contra proferentem if an ambiguity is patent and the contractor failed to seek clarification. See Triax Pacific, Inc. v. West, 130 F.3d 1469 (Fed. Cir. 1997) (holding that contractor should have recognized the patent ambiguity and sought clarification before submitting its bid).
- b. An ambiguity is patent if it would have been apparent to a reasonable person in the claimant's position or if the provisions conflict on their face. See White v. Edsall Constr. Co., Inc., 296 F.3d 1081 (2002) (holding that a note disclaiming the government's warranty on one of several dozen design drawings was patent); Hensel Phelps Constr. Co., ASBCA No. 49716, 00-2 BCA ¶ 30,925 (holding that an objective standard applied to the latent/patent ambiguity determination); Technical Sys. Assoc., Inc., GSBCA Nos. 13277-COM, 14538-COM, 00-1 BCA ¶ 30,684; Gaston & Assocs., Inc. v. United States, 27 Fed. Cl. 243 (1993) (latent ambiguity); Foothill Eng'g., IBCA No. 3119-A, 94-2 BCA ¶ 26,732 (the misplacement of a comma in a figure was a latent ambiguity and did not trigger a duty to inquire, because it was not obvious and apparent in the context of a reasonable, but busy, bidder). See also Pascal & Ludwig Eng'r, ENG BCA No. 6377, 99-1 BCA ¶ 30,135 (indicating that the ratio of the dollar amount at issue due to the ambiguity versus the contract price is a persuasive factor in determining whether the ambiguity is patent).

## **VI. DEFECTIVE SPECIFICATIONS - OVERVIEW.**

- A. Theories of Recovery. Courts and boards hold the government liable for defects in specifications based upon:
  - 1. The implied warranty the government gives for the use of design specifications in a contract.
  - 2. The principles of impracticability/impossibility of performance when the contractor incurs increased costs while attempting to conform to defective performance specifications.
- B. Causation. This type of constructive change is deemed to have occurred at the time of contract award on the premise that the contracting officer had an immediate duty to issue an order correcting the defective specifications.

## **VII. DEFECTIVE SPECIFICATIONS - IMPLIED WARRANTY OF SPECIFICATIONS.**

- A. Basis for the Implied Warranty.
  - 1. This “warranty” is based on an implied promise by the government that a contractor can follow the contract drawings and specifications and perform without undue expense. This promise has been called a warranty; however, recovery is based on a breach of the duty to provide drawings and specifications reasonably free from defects. White v. Edsall Constr. Co., Inc., 296 F.3d 1081 (2002); Fru-Con Constr. Corp. v. United States, 42 Fed. Cl. 94 (1998); United States v. Spearin, 248 U.S. 132 (1918); Luria Bros. & Co. v. United States, 177 Ct. Cl. 676, 369 F.2d 701 (1966).
  - 2. Defective specifications constitute constructive changes. See, e.g., Hol-Gar Mfg. Corp. v. United States, 175 Ct. Cl. 518, 360 F.2d 634 (1964). In some cases, judges have relied on a breach of contract theory. See, e.g., Big Chief Drilling Co. v. United States, 26 Cl. Ct. 1276 (1992).

B. Specification Types. Aleutian Constr. v. United States, 24 Cl. Ct. 372 (1991); Monitor Plastics Co., ASBCA No. 14447, 72-2 BCA ¶ 9626.

1. **DESIGN SPECIFICATIONS** set forth precise measurements, tolerances, materials, tests, quality control, inspection requirements, and other specific information. See Apollo Sheet Metal, Inc., v. United States, 44 Fed. Cl. 210 (1999); Q.R. Sys. North, Inc., ASBCA No. 39618, 92-2 BCA ¶ 24,793 (specified roofing material inadequate for roof type).
2. **PERFORMANCE SPECIFICATIONS** set forth the operational characteristics desired for the item. In such specifications, design, measurements, and other specific details are neither stated nor considered important as long as the performance requirement is met. See Apollo Sheet Metal, Inc., v. United States, 44 Fed. Cl. 210 (1999); Interwest Constr. v. Brown, 29 F.3d 611 (Fed. Cir. 1994).
3. **PURCHASE DESCRIPTIONS** are specifications that designate a particular manufacturer's model, part number, or product. The phrase "or equal" may accompany a purchase description. M.A. Mortenson Co., ASBCA Nos. 50716, 51241, 51257, 99-1 BCA ¶ 30,270.
4. **COMPOSITE SPECIFICATIONS** are specifications that are comprised of two or more different specification types. See Defense Sys. Co., Inc., ASBCA No. 50918, 00-2 BCA ¶ 30,991; Transtechology, Corp., Space Ordnance Sys. Div. v. United States, 22 Cl. Ct. 349 (1990).

C. Scope of Government Liability.

1. The scope of government liability depends on the specification type. Lopez v. A.C. & S., Inc., 858 F.2d 712 (Fed. Cir. 1988); Morrison-Knudsen Co., ASBCA No. 32476, 90-3 BCA ¶ 23,208.
2. Design specifications.
  - a. The key issue is whether the government required the contractor to use detailed specifications. Geo-Con, Inc., ENG BCA No. 5749, 94-1 BCA ¶ 26,359. Nonconformity with design specifications result in reduction in contract price. Donat Gerg haustechnik, ASBCA Nos. 41197, 42001, 42821, 47456, 97-2 BCA ¶ 29,272.

- b. The government is responsible for design and related omissions, errors, and deficiencies in the specifications and drawings. White v. Edsall Constr. Co., Inc., 296 F.3d 1081 (2002); Apollo Sheet Metal, Inc., v. United States, 44 Fed. Cl. 210 (1999); Neal & Co. v. United States, 19 Cl. Ct. 463 (1990) (defective design specifications found to cause bowing in wall); International Foods Retort Co., ASBCA No. 34954, 92-2 BCA ¶ 24,994 (bland chicken ala king). But see Hawaiian Bitumuls & Paving v. United States, 26 Cl. Ct. 1234 (1992) (contractor may vitiate warranty by participating in drafting and developing specifications).
3. Performance specifications.
  - a. If the government uses a performance specification, the contractor accepts general responsibility for the design, engineering, and achievement of the performance requirements. Apollo Sheet Metal, Inc., v. United States, 44 Fed. Cl. 210 (1999); Blake Constr. Co. v. United States, 987 F.2d 743 (Fed. Cir. 1993); Technical Sys. Assoc., Inc., GSBCA Nos. 13277-COM, 14538-COM, 00-1 BCA ¶ 30,684.
  - b. The contractor has discretion as to the details of the work, but the work is subject to the government's right of final inspection and approval or rejection. Kos Kam, Inc., ASBCA No. 34682, 92-1 BCA ¶ 24,546.
4. Purchase descriptions. Monitor Plastics Co., ASBCA No. 14447, 72-2 BCA ¶ 9626.
  - a. If the contractor furnishes or uses in fabrication a specified brand name or an acceptable and approved substitute brand-name product, the responsibility for proper performance generally falls upon the government.
  - b. The government's liability is conditioned upon the contractor's correct use of the product.
  - c. If the contractor elects to manufacture an equal product, it must ensure that the product is equal to the brand name product.

5. Composite specifications.

- a. If the government uses a composite specification, the parties must examine each portion of the specification to determine which specification type caused the problem. This determination establishes the scope of the government's liability. Aleutian Constr. v. United States, 24 Cl. Ct. 372 (1991); Penguin Indus. v. United States, 530 F.2d 934 (Ct. Cl. 1976). Cf. Hardwick Bros. Co., v. United States, 36 Fed. Cl. 347 (Fed. Cl. 1996) (since mixed specifications were primarily performance-based, there is no warranty covering the specifications).
- b. The contractor must isolate the defective element of the design portion or demonstrate affirmatively that its performance did not cause the problem. Defense Sys. Co., Inc., ASBCA No. 50918, 00-2 BCA ¶ 30,991 (finding that contractor failed to demonstrate deficient fuses were due to deficient Government design rather than production problems).

D. Recovery under the Implied Warranty of Specifications. See Transtechology Corp., Space Ordnance Sys. Div. v. United States, 22 Cl. Ct. 349 (1990).

1. To recover under the implied warranty of specifications, the contractor must prove that:
  - a. It reasonably relied upon the defective specifications and complied fully with them. Phoenix Control Sys., Inc. v. Babbitt, Secy. of the Interior, 1997 U.S. App. LEXIS 8085 (Fed. Cir. 1997); Al Johnson Constr. Co. v. United States, 854 F.2d 467 (Fed. Cir. 1988); Gulf & Western Precision Eng'g Co. v. United States, 543 F.2d 125 (Ct. Cl. 1976); Mega Constr. Co., 29 Fed. Cl. 396 (1993); Bart Assocs., Inc., EBCA No. C-9211144, 96-2 BCA ¶ 28,479; and
  - b. That the defective specifications caused increased costs. McElroy Mach. & Mfg. Co., Inc., ASBCA No. 46477, 99-1 BCA ¶ 30,185; Pioneer Enters., Inc., ASBCA No. 43739, 93-1 BCA ¶ 25,395 (contractor failed to demonstrate that defective specification caused its delay); Chaparral Indus., Inc., ASBCA No. 34396, 91-2 BCA ¶ 23,813, aff'd, 975 F.2d 870 (Fed. Cir. 1992).



2. The contractor cannot recover if it has actual or constructive knowledge of the defects prior to award. M.A. Mortenson Co., ASBCA Nos. 50716, 51241, 51257, 99-1 BCA ¶ 30,270; Centennial Contractors, Inc., ASBCA No. 46820, 94-1 BCA ¶ 26,511; L.W. Foster Sportswear Co. v. United States, 405 F.2d 1285 (Ct. Cl. 1969) (contractor had actual knowledge from prior contract). Generally, constructive knowledge is limited to patent errors because a contractor has no duty to conduct an independent investigation to determine whether the specifications are adequate. Jordan & Nobles Constr. Co., GSBCA No. 8349, 91-1 BCA ¶ 23,659; John C. Grimberg Co., ASBCA No. 32490, 88-1 BCA ¶ 20,346. Cf. Spiros Vasilatos Painting, ASBCA No. 35065, 88-2 BCA ¶ 20,558.
  
3. A contractor may not recover if it decides unilaterally to perform work knowing that the specifications were defective. Ordnance Research, Inc. v. United States, 221 Ct. Cl. 641, 609 F.2d 462 (1979).
  
4. A contractor may not recover if it fails to give timely notice that it was experiencing problems without assistance of the government. McElroy Mach. & Mfg. Co., Inc., ASBCA No. 46477, 99-1 BCA ¶ 30,185; JGB Enters., Inc., ASBCA No. 49493, 96-2 BCA ¶ 28,498.
  
5. The government may disclaim this warranty. See, e.g., Serv. Eng'g Co., ASBCA No. 40272, 92-3 BCA ¶ 25,106; Bethlehem Steel Corp., ASBCA No. 13341, 72-1 BCA ¶ 9186. The disclaimer must be obvious and unequivocal, however, in order to shift the risk to the contractor. White v. Edsall Constr. Co., Inc., 296 F.3d 1081 (2002) (holding that a small note disclaiming the government's warranty found on one of several dozen design drawings was hidden and not obvious).

## VIII. DEFECTIVE SPECIFICATIONS - IMPRACTICABILITY/IMPOSSIBILITY OF PERFORMANCE.

**Elements.** American Mechanical, Inc., ASBCA No. 52033, 03-1 BCA ¶ 32,134; Oak Adec, Inc. v. United States, 24 Cl. Ct. 502 (1991); Reflectone, Inc., ASBCA No. 42363, 98-2 BCA ¶ 29,869; Gulf & Western Indus., Inc., ASBCA No. 21090, 87-2 BCA ¶ 19,881.

A. An unforeseen or unexpected occurrence.

1. A significant increase in work usually caused by unforeseen technological problems. Examine the following factors to determine whether a problem was unforeseen or unexpected:
  - a. The nature of the contract and specifications, i.e., whether they require performance beyond the state of the art;
  - b. The extent of the contractor's effort; and
  - c. The ability of other contractors to meet the specification requirements.
2. In some cases, a contractor must show that an extensive research and development effort was necessary to meet the specifications or that no competent contractor can meet the performance requirements. Hol-Gar Mfg. Corp. v. United States, 360 F.2d 634 (Ct. Cl. 1964); Reflectone, Inc., ASBCA No. 42363, 98-2 BCA ¶ 29,869 (contractor must show specifications "required performance beyond the state of the art" to demonstrate impossibility); Defense Sys. Corp. & Hi-Shear Tech. Corp., ASBCA No. 42939, 95-2 BCA ¶ 27,721.

- B. The contractor did not assume the risk of the unforeseen occurrence by agreement or custom. RNJ Interstate Corp. v. United States, 181 F.3d 1329 (Fed. Cir. 1999) (holding that doctrine of impossibility did not apply to a worksite fire since the contract placed the risk of loss on the contractor until acceptance by the government); Southern Dredging Co., ENG BCA No 5843, 92-2 BCA ¶ 24,886; Fulton Hauling Corp., PSBCA No. 2778, 92-2 BCA ¶ 24,886.
1. A contractor may assume the risk of the unforeseen effort by using its own specifications. See Bethlehem Corp. v. United States, 462 F.2d 1400 (Ct. Cl. 1972); Costal Indus. v. United States, 32 Fed. Cl. 368 (1994) (use of specification drafted, in part, by contractor's supplier held to be assumption of risk); Technical Sys. Assoc. Inc., GSBCA Nos. 13277-COM, 14538-COM, 00-1 BCA ¶ 30,684.
  2. By proposing to extend the state of the art, a contractor may assume the risk of impossible performance. See J.A. Maurer, Inc. v. United States, 485 F.2d 588 (Ct. Cl. 1973).
- C. Performance is commercially impracticable or impossible.
1. The contractor must show that the increased cost of performance is so much greater than anticipated that performance is commercially senseless. See Fulton Hauling Corp., PSBCA No. 2778, 92-2 BCA ¶ 24,886; Technical Sys. Assoc. Inc., GSBCA Nos. 13277-COM, 14538-COM, 00-1 BCA ¶ 30,684; McElroy Mach. & Mfg. Co., Inc., ASBCA No. 46477, 99-1 BCA ¶ 30,185. But see SMC Info. Sys., Inc. v. Gen. Servs. Admin., GSBCA No. 9371, 93-1 BCA ¶ 25,485 (the increased difficulty cannot be the result of poor workmanship).
  2. There is no universal standard for determining "commercial senselessness."
    - a. Courts and boards sometimes use a "willing buyer" test to determine whether the increased costs render performance commercially senseless. A showing of economic hardship on the contractor is insufficient to demonstrate "commercial senselessness." The contractor must show that there are no buyers willing to pay the increased cost of production plus a reasonable profit. Ralph C. Nash, Jr., Government Contract Changes, 13-37 to 13-39 (2d ed. 1989).

- b. Some decisions have stated that it must be “positively unjust” to hold the contractor liable for the increased costs. Raytheon Co., ASBCA Nos. 50166, 50987, 01-1 BCA ¶ 31,245 (57% increase insufficient); Weststates Transp. Inc., PSBCA No. 3764, 97-1 BCA ¶ 28,633; Gulf & Western Indus., Inc., ASBCA No. 21090, 87-2 BCA ¶ 19,881 (70% increase insufficient); HLI Lordship Indus., VABCA No. 1785, 86-3 BCA ¶ 19,182 (200% increase in gold prices insufficient). But see Xplo Corp., DOT BCA No. 1289, 86-3 BCA ¶ 19,125 (50% increase in costs was sufficient).

## IX. INTERFERENCE AND FAILURE TO COOPERATE.

### A. Theory of Recovery.

1. Contracting activities have an implied obligation to cooperate with their contractors and not to administer the contract in a manner that hinders, delays, or increases the cost of performance. Precision Pine & Timber, Inc. v. United States, 50 Fed. Cl. 35, 65-70 (2001) (holding that the Forest Service beached a timber sale contract by suspending the contractor’s logging operations when the Mexican spotted owl was listed as an endangered species instead of consulting with the Fish and Wildlife Service and developing a management plan as was required by the ESA); Coastal Gov’t Serv., Inc., ASBCA No. 50283, 01-1 BCA ¶ 31,353; R&B Bewachungsgesellschaft GmbH, ASBCA No. 42213, 91-3 BCA ¶ 24,310; C.M. Lowther, Jr., ASBCA No. 38407, 91-3 BCA ¶ 24,296. See also Restatement (Second) of Contracts, § 205 (1981).
2. Generally a contractor may not recover for “interference” that results from a sovereign act. See Hills Materials Co., ASBCA No. 42410, 92-1 BCA ¶ 24,636, rev’d sub nom., Hills Materials Co. v. Rice, 982 F.2d 514 (Fed. Cir. 1992); Orlando Helicopter Airways, Inc. v. Widnall, 51 F.3d 258 (Fed. Cir. 1995) (holding that a criminal investigation of the contractor was a noncompensable sovereign act); Henderson, Inc., DOT BCA No. 2423, 94-2 BCA ¶ 26,728 (limitation on dredging period created implied warranty); R&B Bewachungsgesellschaft GmbH, 91-3 BCA ¶ 24,310 (criminal investigators took action in government’s contractual capacity, not sovereign capacity). See also Hughes Communications Galaxy, Inc. v. United States, 998 F.2d 953 (Fed. Cir. 1993) (holding that the government may waive sovereign act defense); Oman-Fischbach Int’l, a Joint Venture, ASBCA No. 44195, 00-2 BCA ¶ 31,022 (actions of a separate sovereign were not compensable constructive changes).

B. Bases for Interference Claims.

1. Overzealous inspection of the contractor's work. Neal & Co., Inc. v. United States, 36 Fed. Cl. 600 (1996) ("nit-picking punch list" held to be overzealous inspection); WRB Corp. v. United States, 183 Ct. Cl. 409 (1968); Adams v. United States, 175 Ct. Cl. 288, 358 F.2d 986 (1966).
2. Incompetence of government personnel. Harvey C. Jones, Inc., IBCA No. 2070, 90-2 BCA ¶ 22,762.
3. Water seepage or flow caused by the government. See C.M. Lowther, Jr., ASBCA No. 38407, 91-3 BCA ¶ 24,296 (water from malfunctioning sump pump was interference); Caesar Constr., Inc., ASBCA No. 41059, 91-1 BCA ¶ 23,639 (government's failure to remove snow piles which resulted in water seepage constituted a breach of its implied duty not to impede the contractor's performance).
4. Disruptive criminal investigations conducted in the government's contractual capacity. R&B Bewachungsgesellschaft GmbH, 91-3 BCA ¶ 24,310.

C. Bases for Failure to Cooperate Claims. The government must cooperate with a contractor. See, e.g., Whittaker Elecs. Sys. v. Dalton, Secy. of the Navy, 124 F.3d 1443 (Fed. Cir. 1997); James Lowe, Inc., ASBCA No. 42026, 92-2 BCA ¶ 24,835; Mit-Con, Inc., ASBCA No. 42916, 92-1 CPD ¶ 24,539. Bases for claims include:

1. Failure to provide assistance necessary for efficient contractor performance. Chris Berg, Inc. v. United States, 197 Ct. Cl. 503, 455 F.2d 1037 (1972) (implied requirement); Durocher Dock & Dredge, Inc., ENG BCA No. 5768, 91-3 BCA ¶ 24,145 (failure to contest sheriff's stop work order was not failure to cooperate); Hudson Contracting, Inc., ASBCA No. 41023, 94-1 BCA ¶ 26,466; Packard Constr. Corp., ASBCA No. 46082, 94-1 BCA ¶ 26,577; Ingalls Shipbldg. Div., Litton Sys., Inc., ASBCA No. 17717, 76-1 BCA ¶ 11,851 (express requirement).

2. Failure to prevent interference by another contractor. Examine closely the good faith effort of the government to administer the other contract to reduce interference. Northrup Grumman Corp. v. United States, 47 Fed. Cl. 20 (2000); Stephenson Assocs., Inc., GSBCA No. 6573, 86-3 BCA ¶ 19,071.
  
3. Failure to provide access to the work site. Summit Contractors, Inc. v. United States, 23 Cl. Ct. 333 (1991) (absent specific warranty, site unavailability must be due to government's fault); Atherton Constr., Inc., ASBCA No. 48527, 00-2 BCA ¶ 30,968; R.W. Jones, IBCA No. 3656-96, 99-1 BCA ¶ 30,268; Old Dominion Sec., ASBCA No. 40062, 91-3 BCA ¶ 24,173, *recons. denied*, 92-1 BCA ¶ 24,374 (failure to grant security clearances); M.A. Santander Constr., Inc., ASBCA No. 35907, 91-3 BCA ¶ 24,050 (interference excused default); Reliance Enter., ASBCA No. 20808, 76-1 BCA ¶ 11,831.
  
4. Abuse of discretion in the approval process. When the contract makes the precise manner of performance subject to approval by the contracting officer, the duty of cooperation requires that the government approve the contractor's methods unless approval is detrimental to the government's interest. Ralph C. Nash, Jr., Government Contract Changes 12-7 (2d ed. 1989). Common bases for claims are:
  - a. Failure to approve substitute items or components that are equal in quality and performance to the contract requirements. Page Constr. Co., AGBCA No. 92-191-1, 93-3 BCA ¶ 26,060; Bruce-Anderson Co., ASBCA No. 29411, 88-3 BCA ¶ 21,135 (contracting officer gave no explanation for refusal).
  
  - b. Unjustified disapproval of shop drawings or failure to approve within a reasonable time. Vogt Bros. Mfg. Co. v. United States, 160 Ct. Cl. 687 (1963).
  
  - c. Improper failure to approve the substitution or use of a particular subcontractor. Lockheed Martin Tactical Aircraft Sys., ASBCA Nos. 49530, 50057, 00-1 BCA ¶ 30,852, *recon. denied*, 00-2 BCA ¶ 30,930; Manning Elec. & Repair Co. v. United States, 22 Cl. Ct. 240 (1991); Hoel-Steffen Constr. Co. v. United States, 231 Ct. Cl. 128, 684 F.2d 843 (1982); Liles Constr. Co. v. United States, 197 Ct. Cl. 164, 455 F.2d 527 (1972); Richerson Constr., Inc. v. Gen. Servs. Admin., GSBCA No. 11161, 93-1 BCA ¶ 25,239. Cf. FAR 52.236-5, Material and Workmanship.

**X. FAILURE TO DISCLOSE VITAL INFORMATION (SUPERIOR KNOWLEDGE).**

**A. Theory.**

1. Part of the government's duty to cooperate with the contractor and not to hinder or interfere with its performance is a duty to disclose vital information of which the contractor is ignorant. See Helene Curtis Indus. v. United States, 312 F.2d 774 (Ct. Cl. 1963); Miller Elevator Co. v. United States, 30 Fed. Cl. 662 (1994); Bradley Constr. Inc. v. United States, 30 Fed. Cl. 507 (1994); Maitland Bros., ENG BCA No. 5782, 94-1 BCA ¶ 26,473.
2. Nondisclosure is a change to the contract because the contracting activity should have disclosed the vital information at contract award. Raytheon Co., ASBCA No. 50166, 50987, 01-1 BCA ¶ 31,245.

**B. Elements of the Implied Duty to Disclose Vital Information.** Hercules, Inc. v. United States, 24 F.3d 188 (Fed. Cir. 1994), aff'd on other grounds, 116 S. Ct. 981 (1996); Technical Sys. Assoc. Inc., GSBCA Nos. 13277-COM, 14538-COM, 00-1 BCA ¶ 30,684.

1. The contractor undertakes to perform without vital knowledge of a fact that affects performance costs or duration. Shawn K. Christiansen d/b/a Island Wide Contracting, AGBCA No. 94-200-3, 95-1 BCA ¶ 27,758; Bradley Constr., Inc. v. United States, 30 Fed. Cl. 507 (1994) (information must have a direct bearing on the cost or duration of contract performance); Johnson & Son Erector Co., ASBCA No. 23689, 86-2 BCA ¶ 18,931 (amount of interference caused by the nondisclosure is a factor in determining whether the information is vital); Numax Elec., Inc., ASBCA No. 29080, 90-1 BCA ¶ 22,280 (government failed to disclose that all previous contractors had been unable to manufacture in accordance with the specifications); Riverport Indus., Inc., ASBCA No. 30888, 87-2 BCA ¶ 19,876 (government must disclose the history of a procurement if the information is necessary to successful performance).

2. The government was aware the contractor had no knowledge of and had no reason to obtain such information. Hardeman-Monier-Hutcherson v. United States, 198 Ct. Cl. 472, 458 F.2d 1364 (1972); Max Jordan Bauunternehmung v. United States, 10 Cl. Ct. 672 (1986), aff'd, 820 F.2d 1208 (Fed. Cir. 1987); GAF Corp. v. United States, 932 F.2d 947 (Fed. Cir. 1991) (government need not inquire into the knowledge of an experienced contractor).
3. The contract specification misled the contractor or did not put it on notice to inquire. Raytheon Co., ASBCA Nos. 50166, 50987, 01-1 BCA ¶ 31,245 (government-furnished technical data package and specifications implied no further development would be required, although government knew this was not possible); D.F.K. Enter., Inc. v. United States, 45 Fed. Cl. 280 (1999) (holding that incomplete and inaccurate weather data was an affirmative misrepresentation of job site conditions); Jack L. Olsen, Inc., AGBCA No. 87-345-1, 93-2 BCA ¶ 25,767 (information provided in solicitation excused contractor from further inquiry). There is no breach of the duty to disclose vital information if the government shows that the contractor knew or should have known of the information. H.N. Bailey & Assoc. v. United States, 449 F.2d 376 (Ct. Cl. 1971) (information was general industry knowledge); Benju Corp., ASBCA No. 43648, 97-2 BCA ¶ 29,274 (Government did not have to disclose readily available information); Metal Trades, Inc., ASBCA No. 41643, 91-2 BCA ¶ 23,982; Hydromar Corp. of Del. & Eastern Seaboard v. United States, 25 Cl. Ct. 555 (1992), aff'd, 980 F.2d 744 (Fed. Cir. 1992) (undisclosed information reasonably was available to the contractor); Maitland Bros. Co., ENG BCA No. 5782, 94-1 BCA ¶ 26,473 (information in public domain).
4. The government failed to provide the relevant information. P.J. Maffei Bldg. Wrecking Corp. v. United States, 732 F.2d 913 (Fed. Cir. 1984) (contractor failed to prove government had better information than already disclosed); Bethlehem Corp. v. United States, 462 F.2d 1400 (Ct. Cl. 1972) (knowledge by one government agency is not attributable to another government agency absent some meaningful connection between the agencies); Marine Indus. Northwest, Inc., ASBCA No. 51942, 01-1 BCA ¶ 31,201 (contractor failed to demonstrate that Government had superior knowledge).



## **XI. CONSTRUCTIVE ACCELERATION.**

### **A. Theory of Recovery.**

1. If a contractor encounters an excusable delay, it is entitled to an extension of the contract schedule.
2. Constructive acceleration occurs when the contracting officer refuses to recognize a new contract schedule and demands that the contractor complete performance within the original contract period.

### **B. Elements of Constructive Acceleration. Fru-Con Constr. Corp. v. United States, 43 Fed. Cl. 306 (1999); Atlantic Dry Dock Corp., ASBCA Nos. 42609, 42610, 42611, 42612, 42613, 42679, 42685, 42686, 44472, 98-2 BCA ¶ 30,025; Trepte Constr. Co., ASBCA No. 28555, 90-1 BCA ¶ 22,595.**

1. The existence of one or more excusable delays;
2. Notice by the contractor to the government of such delay and a request for an extension of time;
3. Failure or refusal by the government to grant the extension request;
4. An express or implied order by the government to accelerate; and
5. Actual acceleration resulting in increased costs.

### **C. Actions That May Lead to Constructive Acceleration.**

1. The government threatens to terminate when the contractor encounters an excusable delay. Intersea Research Corp., IBCA No. 1675, 85-2 BCA ¶ 18,058;
2. The government threatens to assess liquidated damages and refuses to grant a time extension. Norair Eng'g Corp. v. United States, 666 F.2d 546 (Ct. Cl. 1981); Unarco Material Handling, PSBCA No. 4100, 00-1 BCA ¶ 30,682; or

3. The government delays approval of a request for a time extension. Fishbach & Moore Int'l Corp., ASBCA No. 18146, 77-1 BCA ¶ 12,300, aff'd, 617 F.2d 223 (Ct. Cl. 1980). But see Franklin Pavlov Constr. Co., HUD BCA No. 93-C-13, 94-3 BCA ¶ 27,078 (mere denial of delay request due to lack of information not tantamount to government order to accelerate).

D. Measure of Damages.

1. The contractor's acceleration efforts need not be successful; a reasonable attempt to meet a completion date is sufficient. Unarco Material Handling, PSBCA No. 4100, 00-1 BCA ¶ 30,682; Fermont Div., Dynamics Corp., ASBCA No. 15806, 75-1 BCA ¶ 11,139.
2. The measure of recovery will be the difference between:
  - a. The reasonable costs attributable to acceleration or attempting to accelerate; and
  - b. The lesser costs the contractor reasonably would have incurred absent its acceleration efforts; plus
  - c. A reasonable profit on the above-described difference.
3. Common acceleration costs.
  - a. Increased labor costs;
  - b. Increased material cost due to expedited delivery; and
  - c. Loss of efficiency or productivity. A method to compute this cost is to compare the work accomplished per labor hour or dollar during an acceleration period with the work accomplished per labor hour or dollar during a normal period. See Ralph C. Nash, Jr., Government Contract Changes, 18-16 and 18-17 (2d ed. 1989).

## **XII. NOTICE REQUIREMENTS.**

### **A. Notice of a Change by the Contractor.**

1. Formal changes. The standard Changes clauses each state that “the Contractor must assert its right to an adjustment . . . within 30 days after receipt of a written [change] order.” Courts and boards, however, do not strictly construe this requirement unless the untimely notice is prejudicial to the government. Watson, Rice & Co., HUD BCA No. 89-4468-C8, 90-1 BCA ¶ 22,499; SOSA Y Barbera Constrs., S.A., ENG BCA No. PCC-57, 89-2 BCA ¶ 21,754; E.W. Jerdon, Inc., ASBCA No. 32957, 88-2 BCA ¶ 20,729.
2. Constructive Changes.
  - a. Supply / Service Contracts. The standard supply and service contract Changes clauses do not prescribe specific periods within which a contractor must seek an adjustment for a constructive change.
  - b. Construction Contracts. Under the Changes clause for construction contracts, a contractor must assert its right to an adjustment within 30 days of notifying the government that it considers a government action to be a constructive change. FAR 52.243-4(b) and (e). Furthermore, unless the contractor bases its adjustment on defective specifications, it may not recover costs incurred more than 20 days before notifying the government of a constructive change. FAR 52.243-4(d). But see Martin J. Simko Constr., Inc. v. United States, 11 Cl. Ct. 257 (1986) (government must show late notice was prejudicial).
  - c. Content of notice for constructive changes. A contractor must assert a positive, present intent to seek recovery as a matter of legal right. Written notice is not required, and there is no formal method for asserting an intent to recover. The notice, however, must be more than an ambiguous letter that evidences a differing opinion. Likewise, merely advising the contracting officer of problems is not sufficient notice. CTA Inc., ASBCA No. 47062, 00-2 BCA ¶ 30,947; McLamb Upholstery, Inc., ASBCA No. 42112, 91-3 BCA ¶ 24,081.

B. Request for an Equitable Adjustment.

1. Distinction Between Intent to Submit Adjustment and the Request for Adjustment. The actual request for an adjustment to the contract price or other delivery terms can be submitted at a later time. The above requirement for the contractor to assert its rights to an adjustment places the government on notice that there has been an actual or constructive change to the contract, thus permitting the government to possibly adjust its action/inaction.
2. Statute of Limitations.
  - a. For all contracts entered into subsequent to October 1, 1995, there is a six-year statute of limitations on claims against the government thus requiring the request for an equitable adjustment to be submitted within that time frame. See 41 U.S.C. § 605 and FAR 33.206.
  - b. For contracts awarded before October 1, 1995, the contractor's request for an equitable adjustment must be made within a reasonable time unless the contract specifies otherwise. Generally, this will require the contractor to act while the facts supporting the claim are readily available. See LaForge and Budd Construction Co. v. United States 48 Fed. Cl. 566 (2001) (finding *laches* did not bar a contractor's claim submitted seven years after its accrual because the government did not demonstrate it was prejudiced).
3. Effect of Final Payment.
  - a. Requests for equitable adjustments raised for the first time after final payment are untimely. Design & Prod., Inc. v. United States, 18 Cl. Ct. 168 (1989) (final payment rule predicated on express contractual provisions); Navales Enter., Inc., ASBCA No. 52202, 99-2 BCA ¶ 30,528; Electro-Technology Corp., ASBCA No. 42495, 93-2 BCA ¶ 25,750.

- b. Final payment does not bar claims for equitable adjustments that were pending or of which the government had constructive knowledge at the time of final payment. Gulf & Western Indus., Inc. v. United States, 6 Cl. Ct. 742 (1984); Navales Enter., Inc., ASBCA No. 52202, 99-2 BCA ¶ 30,528; David Grimaldi Co., ASBCA No. 36043, 89-1 BCA ¶ 21,341 (contractor must specifically assert a claim as a matter of right; letter merely presented arguments).

C. Notice by the Government.

- 1. The Changes clauses do not specify the time within which the government must claim a downward equitable adjustment. They also do not require the government to notify the contractor that it intends to subsequently assert its right to an adjustment.
- 2. For contracts awarded subsequent to October 1, 1995, the government must assert any claims it has against a contractor within six years from the accrual of the claim, except claims based upon fraud. See 41 U.S.C § 605 and FAR 33.206(b).
- 3. For contracts awarded both before and after October 1, 1995, the government's request for an equitable adjustment must be made within a reasonable time unless the contract specifies otherwise. Generally, this will require the government to act while the facts supporting the claim are readily available and before the contractor's position is prejudiced by final settlement with its subcontractors, suppliers, and other creditors. See Aero Union Corp. v. United States, 47 Fed. Cl. 677 (2000) (denying motion for summary judgment where there were issues of fact concerning whether the government had delayed so long the plaintiff was prejudiced by the delay).

### **XIII. ANALYZING CHANGES ISSUES.**

- A. Determine whether the contract required work that differed from what was called for in the original contract. If not, then there was no "change" to the contract requirements, and a contract adjustment is unnecessary.

- B. If the government changed the contract requirements, determine whether the new work was within or outside the scope of the contract.
  - 1. Within-scope change. The contractor may be entitled to relief pursuant to the Changes clause. FAR 52.243-1 (supplies); FAR 52.243-1, Alternate I (services); FAR 52.243-4 (construction). Under the basic equitable adjustment formula, the contractor is entitled to the difference between the reasonable costs of performing the work as changed and the reasonable costs of performing as originally required. See Chapter 21.
  - 2. Outside-the-scope change (cardinal change). The contractor's entitlement is measured under common law principles. In general, compensatory damages including a reliance component (costs incurred as a consequence of the breach) and an expectancy component (lost profits) are awarded, but consequential damages are not. See Chapter 21.
- C. If a change occurred, determine whether the government employee who ordered/caused the change had actual authority to order the change or whether the contractor can overcome the employee's lack of actual authority.
- D. If a change occurred, determine when the change occurred; when the contractor provided, or when the government can be charged with having acquired, notice of the change; and whether the contractor provided timely notice. Determine if untimely notice prejudiced the government.
- E. If a change occurred, determine the effect of the change on the costs incurred or saved by the contractor and on the time required for contract performance.

#### **XIV. CONCLUSION.**



**APPENDIX A: CHANGES CLAUSE (SUPPLIES), FAR 52.243-1.**

**CHANGES--FIXED-PRICE (AUG 1987)**

- (a) The Contracting Officer may at any time, by written order, and without notice to the sureties, if any, make changes within the general scope of this contract in any one or more of the following:
  - (1) Drawings, designs, or specifications when the supplies to be furnished are to be specially manufactured for the Government in accordance with the drawings, designs, or specifications.
  - (2) Method of shipment or packing.
  - (3) Place of delivery.
- (b) If any such change causes an increase or decrease in the cost of, or the time required for, performance of any part of the work under this contract, whether or not changed by the order, the Contracting Officer shall make an equitable adjustment in the contract price, the delivery schedule, or both, and shall modify the contract.
- (c) The Contractor must assert its right to an adjustment under this clause within 30 days from the date of receipt of the written order. However, if the Contracting Officer decides that the facts justify it, the Contracting Officer may receive and act upon a proposal submitted before final payment of the contract.
- (d) If the Contractor's proposal includes the cost of property made obsolete or excess by the change, the Contracting Officer shall have the right to prescribe the manner of the disposition of the property.
- (e) Failure to agree to any adjustment shall be a dispute under the Disputes clause. However, nothing in this clause shall excuse the Contractor from proceeding with the contract as changed.





**APPENDIX B: CHANGES CLAUSE (SERVICES)**  
**FAR 52.243-1, ALTERNATE I.**

**CHANGES--FIXED-PRICE (AUG 1987)**

- (a) The Contracting Officer may at any time, by written order, and without notice to the sureties, if any, make changes within the general scope of this contract in any one or more of the following:
  - (1) Description of services to be performed.
  - (2) Time of performance (i.e., hours of the day, days of the week, etc.).
  - (3) Place of performance of the services.
- (b) If any such change causes an increase or decrease in the cost of, or the time required for, performance of any part of the work under this contract, whether or not changed by the order, the Contracting Officer shall make an equitable adjustment in the contract price, the delivery schedule, or both, and shall modify the contract.
- (c) The Contractor must assert its right to an adjustment under this clause within 30 days from the date of receipt of the written order. However, if the Contracting Officer decides that the facts justify it, the Contracting Officer may receive and act upon a proposal submitted before final payment of the contract.
- (d) If the Contractor's proposal includes the cost of property made obsolete or excess by the change, the Contracting Officer shall have the right to prescribe the manner of the disposition of the property.
- (e) Failure to agree to any adjustment shall be a dispute under the Disputes clause. However, nothing in this clause shall excuse the Contractor from proceeding with the contract as changed.



## **APPENDIX C: CHANGES CLAUSE (CONSTRUCTION), FAR 52.243-4.**

### **CHANGES (AUG 1987)**

- (a) The Contracting Officer may, at any time, without notice to the sureties, if any, by written order designated or indicated to be a change order, make changes in the work within the general scope of the contract, including changes--
  - (1) In the specifications (including drawings and designs);
  - (2) In the method or manner of performance of the work;
  - (3) In the Government-furnished facilities, equipment, materials, services, or site; or
  - (4) Directing acceleration in the performance of the work.
- (b) Any other written order or oral order (which, as used in this paragraph (b), includes direction, instruction, interpretation or determination) from the Contracting Officer that causes a change shall be treated as a change order under this clause; provided, that the Contractor gives the Contracting Officer written notice stating (1) the date, circumstances, and source of the order and (2) that the Contractor regards the order as a change order.
- (c) Except as provided in this clause, no order, statement, or conduct of the Contracting Officer shall be treated as a change under this clause or entitle the Contractor to an equitable adjustment.
- (d) If any change under this clause causes an increase or decrease in the Contractor's costs of, or the time required for, the performance of any part of the work under this contract, whether or not changed by any such order, the Contracting Officer shall make an equitable adjustment and modify the contract in writing. However, except for an adjustment based on defective specifications, no adjustment for any change under paragraph (b) above shall be made for any costs incurred more than 20 days before the Contractor gives written notice as required. In the case of defective specifications for which the Government is responsible, the equitable adjustment shall include any increased cost reasonably incurred by the Contractor in attempting to comply with such defective specifications.
- (e) The Contractor must assert its right to an adjustment under this clause within 30 days after (1) receipt of a written change order under paragraph (a) of this clause or (2) the furnishing of a written notice under paragraph (b) of this clause, by submitting to the Contracting Officer a written statement describing the general nature and amount of the proposal, unless this period is extended by the Government. The statement of proposal for adjustment may be included in the notice under paragraph (b) above.
- (f) No proposal by the Contractor for an equitable adjustment shall be allowed if asserted after final payment under this contract.



# Appendix D: Standard Form (SF) 30, Amendment of Solicitation/Modification of Contract

AMENDMENT OF SOLICITATION/MODIFICATION OF CONTRACT				1. CONTRACT ID CODE		PAGE OF PAGES	
2. AMENDMENT/MODIFICATION NO.		3. EFFECTIVE DATE		4. REQUISITION/PURCHASE REC. NO.		5. PROJECT NO. (if applicable)	
6. ISSUED BY		CODE		7. ADMINISTERED BY (if other than item 6)		CODE	
8. NAME AND ADDRESS OF CONTRACTOR (No., street, county, State and ZIP Code)				(X)			
				9A. AMENDMENT OF SOLICITATION NO.			
				9B. DATED (SEE ITEM 11)			
				10A. MODIFICATION OF CONTRACT/ORDER NO.			
				10B. DATED (SEE ITEM 11)			
CODE		FACILITY CODE					
11. THIS ITEM ONLY APPLIES TO AMENDMENTS OF SOLICITATIONS							
<input type="checkbox"/> The above numbered solicitation is amended as set forth in item 14. The hour and date specified for receipt of Offers <input type="checkbox"/> is extended. <input type="checkbox"/> is not extended. Offers must acknowledge receipt of this amendment prior to the hour and date specified in the solicitation or as amended, by one of the following methods: (a) By completing items 8 and 15, and returning _____ copies of the amendment; (b) By acknowledging receipt of this amendment on each copy of the offer submitted; or (c) By separate letter or telegram which includes a reference to the solicitation and amendment numbers. FAILURE OF YOUR ACKNOWLEDGMENT TO BE RECEIVED AT THE PLACE DESIGNATED FOR THE RECEIPT OF OFFERS PRIOR TO THE HOUR AND DATE SPECIFIED MAY RESULT IN REJECTION OF YOUR OFFER. If by virtue of this amendment your desire to change an offer already submitted, such change may be made by telegram or letter, provided each telegram or letter makes reference to the solicitation and this amendment, and is received prior to the opening hour and date specified.							
12. ACCOUNTING AND APPROPRIATION DATA (if required)							
13. THIS ITEM ONLY APPLIES TO MODIFICATION OF CONTRACTS/ORDERS. IT MODIFIES THE CONTRACT/ORDER NO. AS DESCRIBED IN ITEM 14.							
CHECK ONE		A. THIS CHANGE ORDER IS ISSUED PURSUANT TO: (Specify authority) THE CHANGES SET FORTH IN ITEM 14 ARE MADE IN THE CONTRACT ORDER NO. IN ITEM 10A.					
		B. THE ABOVE NUMBERED CONTRACT/ORDER IS MODIFIED TO REFLECT THE ADMINISTRATIVE CHANGES (such as changes in paying office, appropriation date, etc.) SET FORTH IN ITEM 14, PURSUANT TO THE AUTHORITY OF FAR 43.103(b).					
		C. THIS SUPPLEMENTAL AGREEMENT IS ENTERED INTO PURSUANT TO AUTHORITY OF					
		D. OTHER (Specify type of modification and authority)					
E. IMPORTANT: Contractor <input type="checkbox"/> is not, <input type="checkbox"/> is required to sign this document and return _____ copies to the issuing office.							
14. DESCRIPTION OF AMENDMENT/MODIFICATION (Organized by DCF section headings, including solicitation/contract subject matter where feasible.)							
Except as provided herein, all terms and conditions of the document referenced in item 9A or 10A, as heretofore changed, remains unchanged and in full force and effect.							
15A. NAME AND TITLE OF SIGNER (Type or print)				15A. NAME AND TITLE OF CONTRACTING OFFICER (Type or print)			
15B. CONTRACTOR/OFFEROR		15C. DATE SIGNED		15B. UNITED STATES OF AMERICA		15C. DATE SIGNED	
(Signature of person authorized to sign)				(Signature of Contracting Officer)			

NSN 7540-01-152-8070  
Previous edition unusable

STANDARD FORM 30 (REV. 10-83)  
Prescribed by GSA FPMR (48 CFR) 53.243

## **CHAPTER 14**

### **CONSTRUCTION CONTRACTING**

<b>I. INTRODUCTION.....</b>	<b>1</b>
<b>II. REFERENCES.....</b>	<b>1</b>
<b>III. CONCEPTS.....</b>	<b>3</b>
A. DEFINITIONS .....	3
B. FISCAL DISTINCTIONS .....	5
C. CONTRACTING PROCEDURES.....	5
<b>IV. METHODS OF ACQUIRING CONSTRUCTION.....</b>	<b>6</b>
A. SEALED BIDDING .....	6
B. NEGOTIATED PROCEDURES .....	6
C. JOB ORDER CONTRACTING. ....	7
D. SIMPLIFIED ACQUISITION OF BASE ENGINEER REQUIREMENTS (SABER) PROGRAM, .....	9
E. DESIGN-BUILD CONTRACTING.....	10
F. CONSTRUCTION AS "ACQUISITION OF COMMERCIAL ITEMS" .....	12
<b>V. CONTRACT TYPES.....</b>	<b>13</b>
A. FIRM FIXED-PRICE (FFP) CONTRACTS.....	13
B. FIXED-PRICE CONTRACTS WITH ECONOMIC PRICE ADJUSTMENT CLAUSES (FP w/EPA). .	14
C. COST-REIMBURSEMENT CONTRACTS.....	14
D. INCENTIVE AND OTHER "FEE" CONTRACTS .....	14
<b>VI. PRE-BID COMMUNICATIONS.....</b>	<b>14</b>
A. PRESOLICITATION NOTICES.....	14
B. GOVERNMENT-WIDE POINT OF ENTRY (GPE ). ....	16

<b>VII. SOLICITATION.....</b>	<b>16</b>
A. FORMS.. .....	16
B. HARD-COPY OR COMPLETELY IN ELECTRONIC FORMAT .....	16
C. STATUTORY LIMITATIONS.....	16
D. SITE FAMILIARIZATION CLAUSES.....	17
E. BID GUARANTEES. ....	19
F. PRE-BID CONFERENCES.. .....	21
G. BID/PROPOSAL PREPARATION TIME.....	22
<b>VIII. AWARD.....</b>	<b>22</b>
A. RESPONSIVENESS ISSUES .....	22
B. RESPONSIBILITY ISSUES .....	23
C. PRICE EVALUATION .....	25
<b>IX. CONTRACT ADMINISTRATION. ....</b>	<b>25</b>
A. PRECONSTRUCTION ORIENTATION .....	25
B. PERFORMANCE AND PAYMENT BONDS .....	26
C. DIFFERING SITE CONDITIONS (DSC).....	29
D. VARIATIONS IN ESTIMATED QUANTITY. ....	32
E. SUSPENSION OF WORK.....	33
F. PERMITS AND RESPONSIBILITIES .....	34
G. SPECIFICATIONS AND DRAWINGS.....	36
H. LIQUIDATED DAMAGES (LDs). ....	37
I. USE/POSSESSION PRIOR TO COMPLETION. ....	38
<b>X. CONCLUSION. ....</b>	<b>38</b>



## **CHAPTER 14**

### **CONSTRUCTION CONTRACTING**

**I. INTRODUCTION.** Following this block of instruction, students should:

- A. Understand the unique clauses and procedures used in construction contracting.
- B. Understand how to analyze common legal issues that arise in construction contracting.

**II. REFERENCES.**

- A. Federal Regulations.
  - 1. Federal Acquisition Regulation (FAR) Part 36.
  - 2. Defense Federal Acquisition Regulation Supplement (DFARS) Part 236.
  - 3. Army Federal Acquisition Regulation Supplement (AFARS) Part 5136.
  - 4. Air Force Federal Acquisition Regulation Supplement (AFFARS) Part 5336.
  - 5. Navy Acquisition Procedures Supplement (NAPS) Part 5236.
- B. Army Regulations (AR).
  - 1. AR 210-50, Housing Management (26 Feb 1999).
  - 2. AR 415-15, Army Military Construction Program Development and Execution (4 Sept 1998).

MAJ Michael Devine  
54<sup>th</sup> Graduate Course  
FY 06

3. AR 415-32, Engineer Troop Unit Construction in Connection with Training Activities (15 Apr 1998).
4. AR 420-10, Management of Installation Directorates of Public Works (15 Apr 1997).
5. AR 420-18, Facilities Engineering Material, Equipment, and Relocatable Building Management (3 Jan 1992) [hereinafter AR 420-18].
6. DA Pam 415-15, Army Military Construction Program Development and Execution (25 Oct 1999) [hereinafter DA Pam 415-15].
7. DA Pam 420-11, Project Definition and Work Classification (7 Oct 1994) [hereinafter DA Pam 420-11].

C. Air Force Policy Directives (AFPD) and Air Force Instructions (AFI).

1. AFPD 32-90, Real Property Management (10 Sept 1993).
2. AFI 32-1021, Planning and Programming Military Construction (MILCON) Projects (24 Jan 2003).
3. AFI 32-1031, Operations Management (1 Jul 1997).
4. AFI 32-1032, Planning and Programming Appropriated Funded Maintenance, Repair, and Construction Projects (25 Sept 2001).
5. AFI 32-6001, Family Housing Management (26 Apr 1994).
6. AFI 32-6002, Family Housing Planning, Programming, Design, and Construction (27 May 1997).
7. AFI 65-601, vol. 1, Budget Guidance and Procedures (21 Oct 1994).

D. Navy Regulation. OPNAVINST 11010.20F, Facilities Projects Manual (7 Jun 1996).

- E. Richard J. Bednar, John Cibinic, Jr., Ralph C. Nash, Jr., et al., Construction Contracting, published by The George Washington University Government Contracts Program, 1991.
- F. Adrian L. Bastianelli, Andrew D. Ness, Federal Government Construction Contracts, published by the American Bar Association Forum on the Construction Industry, 2003.

### III. CONCEPTS.

#### A. Definitions.

##### 1. Construction.

- a. Statutory Definition. 10 U.S.C. § 2801(a). The term “military construction” includes “any construction, development, conversion, or extension of any kind carried out with respect to a military installation.”<sup>1</sup>
- b. Regulatory Definitions.
  - (1) FAR 2.101. The term “construction” refers to the construction, alteration, or repair of buildings, structures, or other real property.
    - (a) Construction includes dredging, excavating, and painting.
    - (b) Construction does not include work performed on vessels, aircraft, or other items of personal property.

---

<sup>1</sup> The term “military installation” means “a base, camp, post, station, yard, center, or other activity under the jurisdiction of the Secretary of a military department or, in the case of an activity in a foreign country, under the operational control of the Secretary of a military department or the Secretary of Defense.” 10 U.S.C. § 2801(c)(2).

(2) Service Regulations. See, e.g., AR 415-15, Glossary, sec. II; AR 415-32, Glossary, sec. II; AR 420-10, Glossary, sec. II; AFI 32-1021, paras. 3.2. and 4.2; AFI 32-1032, para. 5.1.1; AFI 65-601, vol. 1, attch 1; OPNAVINST 11010.20F, ch. 6, para. 6.1.1. The term “construction” includes:

- (a) The erection, installation, or assembly of a new facility;<sup>2</sup>
- (b) The addition, expansion, extension, alteration, conversion, or replacement of an existing facility;
- (c) The relocation of a facility from one site to another;
- (d) Installed equipment (e.g., built-in furniture, cabinets, shelving, venetian blinds, screens, elevators, telephones, fire alarms, heating and air conditioning equipment, waste disposals, dishwashers, and theater seats); and
- (e) Related site preparation, excavation, filling, landscaping, and other land improvements.

2. Military Construction Project. 10 U.S.C. § 2801(b). The term “military construction project” includes “all military construction work . . . necessary to produce a complete and usable facility or a complete and usable improvement to an existing facility . . . .”

---

<sup>2</sup> The term “facility” means “a building, structure, or other improvement to real property.” 10 U.S.C. § 2801(c)(1).

B. Fiscal Distinctions.

1. As a general rule, the government funds projects costing less than \$750,000 with Operations and Maintenance (O&M) funds; projects costing more than \$750,000, but less than \$1.5 million, with Unspecified Minor Military Construction (UMMC) funds; and projects costing more than \$1.5 million with Military Construction (MILCON) funds. 10 U.S.C. §§ 2802, 2805. See Chapter 5, Construction Funding, in CONTRACT & FISCAL L. DEP'T, THE JUDGE ADVOCATE GENERAL'S SCHOOL, U.S. ARMY, FISCAL LAW COURSE DESKBOOK (current Edition), available on the TJAGSA Web Page in the Publications library ([www.jagcnet.army.mil/TJAGSA](http://www.jagcnet.army.mil/TJAGSA)).
2. For fiscal law purposes, "construction" does not include repair or maintenance. Therefore, the government may fund repair and maintenance projects with O&M funds, regardless of the cost. AR 420-10, Glossary, sec. II; AFI 32-1032, para. 1.3.2; OPNAVINST 11010.20F, paras. 3.1.1 and 4.1.1.
3. The government must award construction contracts in accordance with FAR Part 36, DFARS Part 236, and any applicable service supplement, regardless of the funding source.

C. Contracting Procedures.

1. As with most procurements, the government must take certain steps to procure construction properly.
2. These steps normally include:
  - a. Deciding which acquisition method to use;
  - b. Deciding which type of contract to use;
  - c. Deciding what, if any, pre-bid communications are required (or otherwise warranted);

- d. Deciding what information and which clauses to place in the solicitation;
  - e. Deciding which contractor should receive the award; and
  - f. Administering the contract.
- 3. An Independent Government Estimate, or IGE, is necessary if the proposed contract, or any proposed modification to a construction contract, exceeds \$100,000. The Contracting Officer may require an IGE for contracts less than \$100,000. The IGE is not normally disclosed to offerors. FAR 36.203. IGEs will be marked “For Official Use Only,” or “FOUO.” DFARS 236.203.

#### **IV. METHODS OF ACQUIRING CONSTRUCTION.**

- A. Sealed Bidding. FAR 6.401; FAR 36.103. Contracting officers must use sealed bidding procedures to acquire construction if:
  - 1. Time permits;
  - 2. Award will be made on the basis of price and price-related factors;
  - 3. Discussions are not necessary; and
  - 4. There is a reasonable expectation of receiving more than one bid.
- B. Negotiated Procedures. FAR 6.401; FAR 36.103.
  - 1. Contracting officers must use negotiated procedures to acquire construction if:
    - a. Time does not permit the use of seal bidding procedures;

- b. Award will not be made on the basis of price and price-related factors;
    - c. Discussions are necessary, or
    - d. There is not a reasonable expectation of receiving more than one bid. See Michael C. Avino, Inc., B-250689, Feb. 17, 1993, 93-1 CPD ¶ 148; see also Pardee Constr. Co., B-256414, June 13, 1994, 94-1 CPD ¶ 372.
  - 2. Contracting officers may use negotiated procedures to acquire construction outside the United States, its possessions, or Puerto Rico, even if sealed bidding is otherwise required.
  - 3. Contracting officers must use negotiated procedures to acquire architect-engineer services.
- C. Job Order Contracting. AFARS Subpart 5117.90. See Schnorr-Stafford Constr., Inc., B-227323, Aug. 12, 1987, 87-2 CPD ¶ 153; Salmon & Assoc., B-227079, Aug. 12, 1987, 87-2 CPD ¶ 152.
- 1. A job order contract (JOC) is an indefinite-delivery, indefinite-quantity contract used to acquire real property maintenance/repair and minor construction at the installation level.
  - 2. The government develops task specifications and a unit price book. The contractor then multiplies the government's unit price by its own coefficient (e.g., profit + overhead) to arrive at its bid/proposal price.
  - 3. After contract award, the parties enter into bilateral task orders for individual projects based on the tasks and prices specified in the JOC.<sup>3</sup>

---

<sup>3</sup> Each task order becomes a fixed-price, lump sum contract. AFARS 5117.9003-1(e).

4. JOC Limitations.

- a. The government should not use a JOC for projects with an estimated value less than \$2,000, or greater than \$750,000. AFARS 5117.9000(a).
- b. The government cannot use a JOC to acquire installation facilities engineering support services (e.g., custodial or ground maintenance services). AFARS 5117.9002(b).
- c. The government cannot use a JOC to acquire architect-engineer services. AFARS 5117.9002(b).
- d. An IGE is required for orders of \$100,000 or more. AFARS 5117.9004-3(c).
- e. The government should not use a JOC to acquire work:
  - (1) Normally set aside for small and disadvantaged businesses;
  - (2) Traditionally covered by requirements contracts (e.g., painting, roofing, etc.);
  - (3) Covered by contracts awarded under the Commercial Activities Program; or
  - (4) The government can effectively and economically accomplish in-house.

AFARS 5117.9003-3(a).



D. Simplified Acquisition of Base Engineer Requirements (SABER) Program, AFFARS Appendix DD

1. Similar in scope and nature to the Army's JOC program, SABER is an ID/IQ contract vehicle to expedite the execution of non-complex minor construction and maintenance & repair projects. AFFARS DD-102 and 103(a).
2. The process of using the SABER is similar to the JOC. An established Unit Price Book and coefficients are combined to price each specific project. AFFARS DD-102.
3. SABER Limitations.
  - a. SABER should not be used to replace a traditional construction program, or for large, complex construction projects. SABER should also not be used for projects that are traditionally single skill/materials projects that are more appropriate for competitively bid contracts or single trade ID/IQs. AFFARS DD-104(a).
  - b. Saber shall not be used to acquire architect-engineering (A-E) services. AFFARS DD-104(b).
  - c. Individual SABER delivery orders shall not exceed \$500,000 unless waived by the installation commander. AFFARS DD-104(c).
  - d. SABER may not be used to perform non-personal services subject to the Service Contract Act. AFFARS DD-104(e).

E. Design-Build Contracting. 10 U.S.C. § 305a; 41 U.S.C. § 253m; FAR Subpart 36.3.

1. Background. In the past, a contracting officer could not award a contract to build a project to the firm that designed the project unless the agency head or the agency head's delegee approved. FAR 36.209. See Lawlor Corp., B-241945.2, Mar. 28, 1991, 70 Comp. Gen. 375, 91-1 CPD ¶ 335. In 1995, however, Congress established new, two-phase design-build selection procedures that allow the same firm to design and build a project. National Defense Authorization Act of 1996, Pub. L. No. 104-106, 110 Stat. 186 (1995).
2. Definitions. FAR 36.102.
  - a. "Design" is the process of defining the construction requirement, producing the technical specifications and drawings, and preparing the construction cost estimate.
  - b. "Design-bid-build" is the traditional method of construction contracting in which design and construction are sequential and contracted for separately, with two contracts and two contractors.
  - c. "Design-build" is the new method of construction contracting in which design and construction are combined in a single contract with a single contractor.
  - d. "Two-phase design-build" is a "design-build" method of construction contracting in which the government selects a limited number of offerors in Phase One to submit detailed proposals in Phase Two.
3. Policy. FAR 36.104. See FAR 36.301(b).
  - a. A contracting officer may use either design-bid-build or design-build procedures to acquire construction.

- b. Unless a contracting officer decides to use design-bid-build (or another authorized acquisition procedure), the contracting officer must use two-phase design-build procedures to acquire construction if:
  - (1) The contracting officer anticipates receiving three or more offers;
  - (2) Offerors must perform a substantial amount of design work (and incur substantial expenses) before they can develop their price proposals; and
  - (3) The contracting officer has considered the factors set forth in FAR 36.301(b)(2), including:
    - (a) The extent to which the agency has adequately defined its project requirements;
    - (b) The time constraints for delivery;
    - (c) The capability and experience of potential offerors;
    - (d) The suitability of the project for two-phase design-build procedures;
    - (e) The capability of the agency to manage the two-phase selection process;
    - (f) Other criteria established by the head of the contracting activity (HCA).

4. Procedures. FAR 36.303.

- a. The agency may issue one solicitation covering both phases, or two solicitations in sequence.

b. Phase One. FAR 36.303-1.

(1) The agency evaluates Phase One proposals to determine which offerors the agency will ask to submit Phase Two proposals.

(2) The Phase One solicitation must include:

(a) The scope of work;

(b) The Phase One evaluation factors (e.g., technical approach, technical qualifications, etc.);

(c) The Phase Two evaluation factors; and

(d) A statement regarding the maximum number of offerors the government intends to include in the competitive range.<sup>4</sup>

c. Phase Two. FAR 36.303-2. The contracting officer awards one contract using competitive negotiation procedures.

F. Construction as “Acquisition of Commercial Items,” FAR Part 12.

1. On 3 July 2003, the Administrator of the Office of Federal Procurement Policy (OFPP) issued a memorandum stating that FAR Part 12, Acquisition of Commercial Items, "should rarely, if ever be used for new construction acquisitions or non-routine alteration and repair services." Rather, “in accordance with long-standing practice, agencies should apply the policies of FAR Part 36 to these acquisitions.” See Memorandum, Administrator of Office of Federal Procurement Policy, to Agency Senior Procurement Executives, Subject: Applicability of FAR Part 12 to Construction Acquisitions (July 3, 2003).

---

<sup>4</sup> This number should not exceed 5 unless the contracting officer determines that including more than five offerors in the competitive range is in the government’s best interests. FAR 36.303-1(a)(4).

2. the memorandum stated that Part 12 acquisitions are generally well suited for certain types of construction activities “that lack the level of variability found in new construction and complex alteration and repair,” such as routine painting or carpeting, simple hanging of drywall, everyday electrical or plumbing work, and similar noncomplex services.”

## **V. CONTRACT TYPES.**

### **A. Firm Fixed-Price (FFP) Contracts. FAR 36.207.**

1. Agencies normally award FFP contracts for construction.
2. The contracting officer may require pricing on a lump-sum, unit price, or combination basis.
  - a. With lump sum pricing, the agency pays a lump sum for:
    - (1) The total project; or
    - (2) Defined portions of the project.
  - b. With unit pricing, the agency pays a unit price for a specified quantity of work units.
  - c. Agencies must use lump-sum pricing unless:
    - (1) The contract involves large quantities of work such as grading, paving, building outside utilities, or site preparation;
    - (2) The agency cannot estimate the quantities of work adequately;
    - (3) The estimated quantities of work may change significantly during construction; or

- (4) Offerors would have to expend spend a lot of time/money to develop adequate estimates.

B. Fixed-Price Contracts with Economic Price Adjustment Clauses (FP w/EPA). FAR 36.207(c). Agencies may use this type of contract if:

1. The use of an EPA clause is customary for the type of work the agency is acquiring;
2. A significant number of offerors would not bid unless the agency included an EPA clause in the contract; or
3. Offerors would include unwarranted contingencies in their prices unless the agency included an EPA clause in the contract.

C. Cost-Reimbursement Contracts. See Military Construction Appropriations Act, 2002, Pub. L. No. 107-64, § 101, 115 Stat. 474 (2001); DFARS 236.271; AFARS 5136.271; AFFARS 5336.271; NAPS 5236.271. The Assistant Secretary of Defense (Production and Logistics) (ASD(P&D)) must approve the award of a cost-plus-fixed-fee contract for construction if:

1. The activity uses military construction appropriations;
2. Performance will occur in the United States (Alaska excluded); and
3. The acquiring activity expects the contract to exceed \$25,000.

D. Incentive and Other “Fee” Contracts. FAR 36.208. Activities cannot use incentive, cost-plus-fixed-fee, or other fee contracts at the same work site with firm fixed-price contracts without the approval of the HCA.

## **VI. PRE-BID COMMUNICATIONS.**

A. Presolicitation Notices. FAR 36.213-2; FAR 36.701(a); FAR 53.301-1417, Standard Form (SF) 1417, Presolicitation Notice (Construction Contract).

1. The contracting officer must send presolicitation notices to prospective bidders if the proposed contract is expected to equal or exceed \$100,000.
2. Contents. FAR 36.213-2(b). Among other things, presolicitation notices must:
  - a. Describe the magnitude of the project;<sup>5</sup>
  - b. State the location of the proposed work;
  - c. Include relevant dates (e.g., the proposed bid opening date and the proposed contract completion date);
  - d. State where contractors can inspect the contract plans without charge;<sup>6</sup>
  - e. Specify a date by which bidders should submit requests for the solicitation;
  - f. State whether the government intends to restrict award to small businesses; and

---

<sup>5</sup> The contracting officer cannot disclose the government cost estimate; however, the contracting officer can state the magnitude of the project in terms of physical characteristics and estimated price range. FAR 36.204; DFARS 236.204. The Estimated price ranges are as follows:

- (a) Less than \$25,000.
- (b) Between \$25,000 and \$100,000.
- (c) Between \$100,000 and \$250,000.
- (d) Between \$250,000 and \$500,000.
- (e) Between \$500,000 and \$1,000,000.
- (f) Between \$1,000,000 and \$5,000,000.
- (g) Between \$5,000,000 and \$10,000,000.
- (h) More than \$10,000,000.

FAR 36.204 -- Disclosure of the Magnitude of Construction Projects. The DFARS provides ranges between \$10,000,000 and 500,000,000. (the additional ranges are: \$10M - \$25M, \$25M - \$100 M, \$100M - \$250M, and \$250M - \$500M.) DFARS 236.204.

<sup>6</sup> Beginning on 17 August 2000, the Contracting Officer may provide contract drawings and specifications solely in electronic format. DFARS 252.236-70001.

- g. Specify the amount the government intends to charge for solicitation documents, if any.
- 3. Distribution. FAR 36.211.
  - a. The contracting officer should send presolicitation notices to:
    - (1) Contractors on the bidders list; and
    - (2) Organizations that maintain display rooms for such information.
  - b. The contracting officer determines the geographical range of distribution.
- B. Government-wide Point of Entry (GPE). FAR 36.213, FAR 5.003. The contracting officer must also post the presolicitation notice in the GPE.

## **VII. SOLICITATION.**

- A. Forms. FAR 36.701; FAR 53.301-1442, SF 1442, Solicitation, Offer, and Award (Construction, Alteration, or Repair); DFARS 236.701.
  - 1. The contracting officer uses a SF 1442 in lieu of a SF 33.
  - 2. If a bidder fails to return this form with its offer, the offer is nonresponsive. See C.J.M. Contractors, Inc., B-250493.2, Nov. 24, 1992, 92-2 CPD ¶ 376.
- B. The contracting officer may provide drawings, specifications, and Maps in either hard-copy or completely in electronic format. DFARS 236.570 and 252.236-7001.
- C. Statutory Limitations. FAR 36.205; DFARS 252.236-7006.



1. The solicitation must include any statutory cost limitations. See K.C. Brandon Constr., B-245934, Feb. 3, 1992, 92-1 CPD ¶ 139.<sup>7</sup>

2. The government must normally reject any offer that:

- a. Exceeds the applicable statutory limitations;<sup>8</sup> or
- b. Is only within the statutory limitations because it is materially unbalanced.

See William G. Tadlock Constr., B-252580, June 29, 1993, 93-1 CPD ¶ 502; H. Angelo & Co., B-249412, Nov. 13, 1992, 92-2 CPD ¶ 344.

3. Some statutory limitations are waivable. See 10 U.S.C. § 2853; see also TECOM, Inc., B-240421, Nov. 9, 1990, 90-2 CPD ¶ 386.

#### D. Site Familiarization Clauses.

---

<sup>7</sup> FAR 36.205 -- Statutory Cost Limitations.

- (a) Contracts for construction shall not be awarded at a cost to the Government --
  - (1) In excess of statutory cost limitations, unless applicable limitations can be and are waived in writing for the particular contract; or
  - (2) Which, with allowances for Government-imposed contingencies and overhead, exceeds the statutory authorization.
- (b) Solicitations containing one or more items subject to statutory cost limitations shall state --
  - (1) The applicable cost limitation for each affected item in a separate schedule;
  - (2) That an offer which does not contain separately-priced schedules will not be considered; and
  - (3) That the price on each schedule shall include an approximate apportionment of all estimated direct costs, allocable indirect costs, and profit.
- (c) The Government shall reject an offer if its prices exceed applicable statutory limitations, unless laws or agency procedures provide pertinent exemptions. However, if it is in the Government's interest, the contracting officer may include a provision in the solicitation which permits the award of separate contracts for individual items whose prices are within or subject to applicable statutory limitations.
- (d) The Government shall also reject an offer if its prices are within statutory limitations only because it is materially unbalanced. An offer is unbalanced if its prices are significantly less than cost for some work, and overstated for other work.

<sup>8</sup> The contracting officer may award separate contracts for individual items whose prices are within the applicable statutory limitations if: (1) the contracting officer included a provision that permits such awards in the solicitation; and (2) such awards are in the government's interest. FAR 36.205(c); FAR 52.214-19.

1. Site Investigation and Conditions Affecting the Work. FAR 36.210; FAR 36.503; FAR 52.236-3.
  - a. By submitting a bid, a contractor acknowledges that it has investigated the job site and the conditions affecting the proposed work.
  - b. Among other things, a contractor is supposed to investigate:
    - (1) Conditions bearing upon transportation, disposal, handling, and storage of materials;
    - (2) The availability of labor, water, electric power, and roads;
    - (3) Uncertainties of weather, river stages, tides, and similar physical conditions at the site;
    - (4) The conformation and condition of the ground;
    - (5) The character of needed equipment and facilities;
    - (6) The character, quality, and quantity of discoverable surface and subsurface materials and/or obstacles;
  - c. A contractor need not hire its own geologists or conduct extensive engineering efforts to verify conditions that it can reasonably infer from the solicitation or a site visit. See Michael-Mark Ltd., IBCA No. 2697, 94-1 BCA ¶ 26,453.

- d. A contractor must perform at the contract price if the contractor could have discovered a condition by a reasonable site investigation. See Weeks Dredging & Contracting, Inc. v. United States, 13 Cl. Ct. 193 (1987); Avisco, Inc., ENG BCA No. 5802, 93-3 BCA ¶ 26,172; Signal Contracting, Inc., ASBCA No. 44963, 93-2 BCA ¶ 25,877; cf. I.M.I., Inc., B-233863, Jan. 11, 1989, 89-1 CPD ¶ 30.
    - e. The government is not normally bound by the contractor's interpretation of government data and representations not included in the solicitation. See Eagle Contracting, Inc., AGBCA No. 88-225-1, 92-3 BCA ¶ 25,018.
  - 2. Physical Data. FAR 36.504; FAR 52.236-4.
    - a. The contracting officer may provide physical data for the convenience of the contractor.
    - b. The government is not responsible for a contractor's erroneous interpretations or conclusions. But see United Contractors v. United States, 177 Ct. Cl. 151, 368 F.2d 585 (Ct. Cl. 1966).
  - 3. Changes After Bid Closing Date. The government is normally responsible for increased performance costs caused by changes at a site after the date of bid submission, even if offerors agree to extend the bid acceptance period. See Valley Constr. Co., ENG BCA No. 6007, 93-3 BCA ¶ 26,171.
- E. Bid Guarantees. FAR 28.101; FAR 52.228-1; FAR 53.301-24, SF 24, Bid Bond.
- 1. A bid guarantee ensures that a bidder will:
    - a. Not withdraw its bid during the bid acceptance period; and
    - b. Execute a written contract and furnish other required bonds at the time of contract award.
  - 2. Requirement. FAR 28.101-1.

- a. The contracting officer must normally require a bid guarantee whenever the solicitation requires performance and payment bonds. Performance and payment bonds are required by the Miller Act, 40 U.S.C. 270a-270f) for construction contracts exceeding \$100,000, except as authorized by law. FAR 28.102-1. (See Section IX.B, below.)
- b. Contracting Officers may still require bid guarantees in construction contracts less than \$100,000. See, Lawson's Enterprises, Inc. Comp. Gen., B-286708, Jan. 31, 2001, 2001 CPD ¶ 36.
- c. The chief of the contracting office, however, may waive the requirement to provide a bid guarantee if the chief of the contracting office determines that it not in the government's best interest to require a bid guarantee (e.g., for overseas construction, emergency acquisitions, and sole-source contracts).

### 3. Form.

- a. The bid guarantee must be in the form required by the solicitation. See HR Gen. Maint. Corp. B-260404, May 16, 1995, 95-1 CPD ¶ 247; Concord Analysis, Inc., B-239730, Dec. 4, 1990, 90-2 CPD ¶ 452. But see Mid-South Metals, Inc., B-257056, Aug. 23, 1994, 94-2 CPD ¶ 78.
- b. The FAR permits offerors to use surety bonds, postal money orders, certified checks, cashier's checks, irrevocable letters of credit, U.S. bonds, and/or cash. FAR 52.228-1. See Treasury Dep't Cir. 570 (listing acceptable commercial sureties).
- c. If a bidder uses an individual surety, the surety must provide a security interest in acceptable assets equal to the penal sum of the bond. FAR 28.203. See Paradise Const. Co., Comp. Gen. Dec. B-289144, 2001 CPD ¶ 192.

- (1) The adequacy of an individual surety's offering is a matter of responsibility, not responsiveness. See Gene Quigley, Jr., B-241565, Feb. 19, 1991, 70 Comp. Gen. 273, 91-1 CPD ¶ 182. But see Harrison Realty Corp., B-254461.2, 93-2 CPD ¶ 345.
  - (2) A bidder may not be its own individual surety. See Astor V. Bolden, B-257038, Apr. 26, 1994, 94-1 CPD ¶ 288.
4. Penal Amount. FAR 28.101-2 (b). The bid bond must equal 20% of the bid, but not exceed \$3,000,000. But see FAR 28.101-4(c).
5. The contracting officer may not accept a bid accompanied by an apparently unenforceable guarantee. Conservatek Indus., Inc., B-254927, Jan. 26, 1994, 94-1 CPD ¶ 42; MKB Constructors, Inc., B-255098, Jan. 10, 1994, 94-1 CPD ¶ 10; Arlington Constr., Inc., B-252535, July 9, 1993, 93-2 CPD ¶ 10; Cherokee Enter., Inc., B-252948, June 3, 1993, 93-1 CPD ¶ 429; Hugo Key & Son, Inc., B-245227, Aug. 22, 1991, 91-2 CPD ¶ 189; Techno Eng'g & Constr., B-243932, July 23, 1991, 91-2 CPD ¶ 87; Maytal Constr. Corp., B-241501, Dec. 10, 1990, 90-2 CPD ¶ 476; Bird Constr., B-240002, Sept. 19, 1990, 90-2 CPD ¶ 234.
6. Noncompliance with Bid Guarantee Requirements. FAR 28.101-4.
  - a. Noncompliance with bid guarantee requirements normally renders a bid nonresponsive. See Alarm Control Co., B-246010, Nov. 18, 1991, 91-2 CPD ¶ 472.
  - b. The contracting officer, however, may waive the requirement to submit a bid guarantee under nine circumstances. FAR 28.101-4(c). See Rufus Murray Commercial Roofing Sys., B-258761, Feb. 14, 1995, 95-1 CPD ¶ 83; Apex Servs., Inc., B-255118, Feb. 9, 1994, 94-1 CPD ¶ 95.
- F. Pre-Bid Conferences. FAR 14.207. Contracting officers may hold pre-bid conferences when necessary to brief bidders and explain complex specifications and requirements; however, client control is critical. See Cessna Aircraft Co., ASBCA No. 48118, 95-1 BCA ¶ 27,560.

- G. Bid/Proposal Preparation Time. FAR 36.213-3. The contracting officer must give bidders ample time to conduct site visits, obtain subcontractor bids, examine data, and prepare estimates. See Raymond Int'l of Del., Inc., ASBCA No. 13121, 70-1 BCA ¶ 8,341.

## VIII. AWARD.

### A. Responsiveness Issues.

1. A bid is nonresponsive if it exceeds a statutory dollar limitation. FAR 36.205(c); DFARS 252.236-7006. See Ward Constr. Co., B-240064, July 30, 1990, 90-2 CPD ¶ 87; Wynn Constr. Co., B-220649, Feb. 21, 1986, 86-1 CPD ¶ 184.
2. A bid is nonresponsive if the bidder fails to comply with the bid guarantee requirements. FAR 28.101-4(a). See Maytal Constr. Corp., B-241501, Dec. 10, 1990, 90-2 CPD ¶ 476. But see FAR 28.101-4(c) (listing the nine circumstances under which the contracting officer may waive the requirement to submit a bid guarantee).
3. A bid is nonresponsive if the bidder offers a shorter bid acceptance period than the solicitation requires. See SF 1442, Block 13D.
4. A bid is nonresponsive if the bidder fails to acknowledge a material amendment. See Dutra Constr. Co., B-241202, Jan. 31, 1991, 91-1 CPD ¶ 97.
5. A bid is nonresponsive if the bidder fails to acknowledge a Davis-Bacon wage rate amendment unless the offeror is bound by a wage rate equal to or greater than the new rate. See Tri-Tech Int'l, Inc., B-246701, Mar. 23, 1992, 92-1 CPD ¶ 304; Fast Elec. Contractors, Inc., B-223823, Dec. 2, 1986, 86-2 CPD ¶ 627.
6. A bid is nonresponsive if the bidder equivocates on the requirement to obtain permits and licenses. See Bishop Contractors, Inc., B-246526, Dec. 17, 1991, 91-2 CPD ¶ 555.

7. A bid is nonresponsive if it is materially unbalanced. FAR 36.205(d); FAR 52.214-19.
  - a. The government may reject a bid if the bid prices are materially unbalanced between line items, or between subline items.
  - b. A bid is materially unbalanced when:
    - (1) The bid is based on prices that are significantly less than cost for some work, and significantly greater than cost for other work and there is reasonable doubt that the bid will result in the lowest overall cost to the government; or
    - (2) The bid is so unbalanced that it is tantamount to allowing the contractor to recover money in advance of performing the work.

B. Responsibility Issues.

1. Prequalification of Sources. DFARS 236.272. The contracting officer may establish a list of contractors that are qualified to perform a specific contract and limit competition to those contractors.
  - a. The HCA must: (1) determine that the project is so urgent or complex that prequalification is necessary; and (2) approve the prequalification procedures.
  - b. If the contracting officer finds a small business unqualified for responsibility reasons, the contracting officer must refer the matter to the Small Business Administration (SBA) for a preliminary recommendation.
  - c. If the SBA determines that the small business is responsible, the contracting officer must allow it to submit a proposal.

2. Performance Evaluation Reports. FAR 36.201; FAR 53.301-1420, SF 1420, Performance Evaluation, Construction Contracts; DFARS 236.201; AFARS 5136.201; DD Form 2628, Performance Evaluation (Construction).
  - a. Contracting activities must prepare performance evaluation reports for:
    - (1) Construction contracts valued at \$500,000 or more;<sup>9</sup> and
    - (2) Default terminated construction contracts valued at \$10,000 or more.
  - b. Upon their completion, contracting activities must send performance evaluation reports to: U.S. Army Corps Of Engineers, Portland District, ATTN: CENWP-CT-I, P.O. Box 2946, Portland, OR 97208-2946. Available on-line at: <http://www.nwp.usace.army.mil/ct/i/>. You may also reach this data through: [www.usace.army.mil](http://www.usace.army.mil).
  - c. Contracting officers may use performance evaluation reports as part of their preaward survey.<sup>10</sup>
3. Small Businesses. FAR 19.602-1. Before a contracting officer can reject a small business as nonresponsible, the contracting officer must refer the matter to the SBA for a Certificate of Competency (COC).

---

<sup>9</sup> In the Army, contracting activities must prepare performance evaluation reports for each order placed under a JOC of \$100,000 or more. AFARS 36.201.

<sup>10</sup> Within DOD, the contracting officer must use performance evaluation reports if the agency expects the proposed contract to exceed \$1 million. DFARS 236.201.



4. Performance of Work by Contractor. FAR 36.501; FAR 52.236-1.
  - a. Whether a contractor intends to perform the contractually required percentage of work with its own forces is normally a matter of responsibility, not responsiveness. See Luther Constr. Co., B-241719, Jan. 28, 1991, 91-1 CPD ¶ 76. But see Blount, Inc. v. United States, 22 Cl. Ct. 221 (1990); C. Iber & Sons, Inc., B-247920.2, Aug. 12, 1992, 92-2 CPD ¶ 99.
  - b. FAR clause 52.236-1 (Performance of Work by the Contractor) does not apply to small business or 8(a) set-asides. FAR 36.501(b). But see FAR clause 52.219-14.

C. Price Evaluation.

1. The contracting officer must evaluate additive items properly. DFARS 236.303-70; DFARS 252.236-7007.
2. The contracting officer must award the contract to the bidder who submits the low bid for the base project and the additive items which, in order of priority, provide the most features within the applicable funding constraints.
3. The contracting officer must select the low bidder based on the funding available at the time of bid opening. See Huntington Constr., Inc., B-230604, June 30, 1988, 67 Comp. Gen. 499, 88-1 CPD ¶ 619; Applicators Inc., B-270162, Feb. 1, 1996, 96-1 CPD ¶ 32.

**IX. CONTRACT ADMINISTRATION.**

- A. Preconstruction Orientation. FAR 36.212. See FAR 52.236-26; see also FAR 22.406-1; DFARS 222.406-1.
  1. The contracting officer must inform successful offerors of significant matters of interest (e.g., statutory matters, subcontracting plan requirements, contract administration matters, etc.).

2. The contracting officer may issue an explanatory preconstruction letter or hold a preconstruction conference.

B. Performance and Payment Bonds.

1. Requirements. 40 U.S.C. §§ 270a-270f; FAR 28.102-1.

- a. Contracts Over \$100,000. FAR 28.102-1(a); FAR 28.102-3(a); FAR 52.228-15. The contractor must provide performance and payment bonds before it can begin work. See TLC Servs., Inc., B-254972.2, Mar. 30, 1994, 94-1 CPD ¶ 235.

- b. Contracts Between \$25,000 and \$100,000. FAR 28.102-1(b); FAR 28.102-3(b); FAR 52.228-13.

- (1) The contracting officer must select two or more of the following payment protections:

- (a) Payment bonds;

- (b) Irrevocable letters of credit;<sup>11</sup>

- (c) Tripartite escrow agreements; or

- (d) Certificates of deposit.

- (2) The contractor must submit one of the selected payment protections before it can begin work.

---

<sup>11</sup> The contracting officer is suppose to give “particular consideration” to including irrevocable letters of credit as one of the selected payment protections. FAR 28.102-1(b).

2. Performance Bonds. FAR 28.102-2(a); FAR 52.228-15; FAR 53.301-25, SF 25, Performance Bond.
  - a. Performance bonds protect the government.
  - b. The penal amount of the bond is normally 100% of the original contract price.
    - (1) The contracting officer may reduce the penal amount if the contracting officer determines that a lesser amount adequately protects the government.
    - (2) The contracting officer may require additional protection if the contract price increases.
3. Payment Bonds. FAR 28.102-2(b); FAR 52.228-15; FAR 53.301-25-A, SF 25-A, Payment Bond.
  - a. Payment bonds protect subcontractors and suppliers.
  - b. The penal amount must equal 100% of the original contract price unless the contracting officer determines, in writing, that requiring a payment bond in that amount is impractical.
    - (1) If the contracting officer determines that requiring a payment bond in an amount equal to 100% of the original contract price is impractical, the contracting officer must set the penal amount of the bond.
    - (2) The amount of the payment bond may never be less than the amount of the performance bond.

See Construction Industry Payment Protection Act of 1999, Pub. L. No. 106-49, 113 Stat. 231.

4. Noncompliance with Bond Requirements. Failure to provide acceptable bonds justifies terminating the contract for default. FAR 52.228-1. See Pacific Sunset Builders, Inc., ASBCA No. 39312, 93-3 BCA ¶ 25,923.
5. Withholding Contract Payments. FAR 28.106-7.
  - a. During Contract Performance. The contracting officer should not withhold payments. FAR 28.106-7(a). But see Balboa Ins. Co. v. United States, 775 F.2d 1158 (Fed. Cir. 1985); National Surety Corp., 31 Fed. Cl. 565 (1994); Johnson v. All-State Const., 329 F.3d 848 (CAFC 2003) (Government was entitled to withhold progress payments pursuant to its common-law right to set-off pending liquidated damages).
  - b. After Contract Completion. The contracting officer must withhold final payment if the surety provides written notice regarding the contractor's failure to pay its subcontractors or suppliers.
    - (1) The surety must agree to hold the government harmless.
    - (2) The contracting officer may release final payment if:
      - (a) The parties reach an agreement; or
      - (b) A court determines the parties' rights.
  - c. Labor Violations. See generally FAR Part 22.
6. Waiver Provisions. 10 U.S.C. §§ 270a(b) and 270e; FAR 28.102-1(a).
  - a. The contracting officer may waive the requirement to provide performance and payment bonds if:
    - (1) The contractor performs the work in a foreign country and the contracting officer determines that it is impracticable to require the contractor to provide the bonds; or

(2) The Miller Act (or another statute) authorizes the waiver.

b. The Service Secretaries may waive the requirement to provide performance and payment bonds for cost-type contracts.

C. Differing Site Conditions (DSC). FAR 52.236-2.

1. This clause allows for an equitable adjustment if the contractor provides prompt, written notice of a differing site condition.

2. There are two types of differing site conditions. See Consolidated Constr., Inc., GSBICA No. 8871, 88-2 BCA ¶ 20,811.

a. Type I Differing Site Conditions. To recover for a Type I condition, the contractor must prove that:

(1) The contract either implicitly or explicitly indicated a particular site condition. See Franklin Pavkov Constr. Co., HUD BCA No. 93-C-C13, 94-3 BCA ¶ 27,078; Glagola Constr. Co., Inc., ASBCA No. 45579, 93-3 BCA ¶ 26,179; Konoike Constr. Co., ASBCA No. 36342, 91-1 BCA ¶ 23,440; cf. Jack L. Olsen, Inc., AGBICA No. 87-345-1, 93-2 BCA ¶ 25,767.

(2) The contractor reasonably interpreted and relied on the contract indications. See R.D. Brown Contractors, Inc., ASBCA No. 43973, 93-1 BCA ¶ 25,368.

(3) The contractor encountered latent or subsurface conditions that differed materially from those indicated in the contract. See Meredith Constr. Co., ASBCA No. 40839, 93-1 BCA ¶ 25,399; Caesar Constr., Inc., ASBCA No. 41059, 91-1 BCA ¶ 23,639.

(4) The claimed costs were attributable solely to the differing site condition. See P.J. Dick, Inc., GSBICA No. 12036, 94-3 BCA ¶ 27,073.

- b. Type II Differing Site Conditions. To recover for a Type II condition, the contractor must prove that:
  - (1) The conditions encountered were unusual physical conditions that were unknown at the time of contract award. See Walser v. United States, 23 Cl. Ct. 591 (1991); Gulf Coast Trailing Co., ENG BCA No. 5795, 94-2 BCA ¶ 26,921; Soletanche Rodio Nicholson (JV), ENG BCA No. 5796, 94-1 BCA ¶ 26,472.
  - (2) The conditions differed materially from those ordinarily encountered. See Green Constr. Co., ASBCA No. 46157, 94-1 BCA ¶ 26,572; Virginia Beach Air Conditioning Corp., ASBCA No. 42538, 92-1 BCA ¶ 24,432; Arctic Slope, Alaska Gen./SKW Eskimos, Inc., ENG BCA No. 5023, 90-2 BCA ¶ 22,850.
3. The DSC clause only covers conditions existing at the time of contract award. Acts of nature occurring after contract award are not differing site conditions. See Arundel Corp. v. United States, 96 Ct. Cl. 77, 354 F.2d 252 (1942); Meredith Constr. Co., ASBCA No. 40839, 93-1 BCA ¶ 25,399; PK Contractors, Inc., ENG BCA No. 4901, 92-1 BCA ¶ 24,583. But see Valley Constr. Co., ENG BCA No. 6007, 93-3 BCA ¶ 26,171.
4. The contractor may not recover if the contractor could have discovered the condition during a reasonable site investigation. See O.K. Johnson Elec. Co., VABCA No. 3464, 94-1 BCA ¶ 26,505; cf. Urban General Contractors, Inc., ASBCA No. 49653, 96-2 BCA ¶ 28,516; Indelsea, S.A., ENG BCA No. PCC-117, 95-2 BCA ¶ 27,633; Steele Contractors, Inc., ENG BCA No. 6043, 95-2 BCA ¶ 27,653; Operational Serv. Corp., ASBCA No. 37059, 93-3 BCA ¶ 26,190; Sagebrush Consultants, 01-1 BCA ¶ 31,159 (IBCA), and American Constr., 01-1 BCA ¶ 31,202.
5. The contractor cannot create its own differing site condition. See Geo-Con, Inc., ENG BCA No. 5749, 94-1 BCA ¶ 26,359.
6. The contractor must prove its damages. See H.V. Allen Co., ASBCA No. 40645, 91-1 BCA ¶ 23,393; see also Praught Constr. Corp., ASBCA No. 39670, 93-2 BCA ¶ 25,896.

7. The contractor must promptly notify the government. See Engineering Tech. Consultants, S.A., ASBCA No. 43376, 92-3 BCA ¶ 25,100.
  - a. Untimely notification may bar a differing site condition claim if the late notice prejudices the government. See Moon Constr. Co. v. General Servs. Admin., GSBCA No. 11766, 93-3 BCA ¶ 26,017; see also Hemphill Contracting Co., ENG BCA No. 5698, 94-1 BCA ¶ 26,491; Meisel Rohrbau, ASBCA No. 35566, 92-1 BCA ¶ 24,434; Holloway Constr., Holloway Sand & Gravel Co., ENG BCA No. 4805, 89-2 BCA ¶ 21,713.
  - b. If the government's defense to a differing site condition claim is made more difficult—but not impossible—by the late notice, courts and boards will normally waive the notice requirement and place a heavier burden of persuasion on the contractor. See Glagola Constr. Co., ASBCA No. 45579, 93-3 BCA ¶ 26,179.
  - c. When the government is on notice of differing site conditions, but takes no exception to the contractor's notice or its corrective actions, the government must pay the contractor's increased costs. See Potomac Marine & Aviation, Inc., ASBCA No. 42417, 93-2 BCA ¶ 25,865.
  - d. Lack of notice of a differing site condition will not bar a contractor's recovery when the government breaches its duty to cooperate by failing to designate an inspector to whom the contractor may give notice during scheduled weekend work. See Hudson Contracting, Inc., ASBCA No. 41023, 94-1 BCA ¶ 26,466.
8. No DSC claim if the contract does not contain the DSC clause. See Marine Industries Northwest, Inc., ASBCA No. 51942, 01-1 BCA ¶ 31,201 (board rejected a Type II DSC claims solely on the basis that there was no DSC clause in the contract. Without the DSC clause, the contractor bears complete risk for any differing conditions encountered).
9. Final payment bars an unreserved differing site condition claim. FAR 52.236-2(d).

D. Variations in Estimated Quantity. FAR 52.211-18.

1. A fixed-price contract may include estimated quantities for unit-priced items of work.
2. If the actual quantity of a unit-priced item varies more than 15% above or below the estimated quantity, the contracting officer must equitably adjust the contract based on “any increase or decrease in costs due solely to the variation.” See Clement-Mtarri Cos., ASBCA No. 38170, 92-3 BCA ¶ 25,192, aff’d sub nom., Shannon v. Clement-Mtarri Cos., No. 93-1268, 12 FPD ¶ 114 (Fed. Cir. 1993); cf. Westland Mechanical, Inc., ASBCA No. 48844, 96-2 BCA ¶ 28,419.
3. Whether a party may demand repricing of work that falls outside the 15% range, or whether the original contract unit price controls, is now settled. Adjustments are based on the difference between the unit cost of the original work, and the unit cost of the work outside the allowable variation range. Foley Co. v. United States, 11 F.3d 1092 (Fed. Cir. 1993). But see TECOM, Inc., ASBCA No. 44122, 94-1 BCA ¶ 26,483.
4. The contractor may request a performance period extension if the variation in the estimated quantity causes an increase in the performance period.

E. Suspension of Work. FAR 52.242-14.

1. The contracting officer may suspend, interrupt, or delay work for the convenience of the government. See Valquest Contracting, Inc., ASBCA No. 32454, 91-1 BCA ¶ 23,381.
2. A government delay is compensable if:
  - a. It is unreasonable. See Southwest Constr. Corp., ENG BCA No. 5286, 94-3 BCA ¶ 27,120; C&C Plumbing & Heating, ASBCA No. 44270, 94-3 BCA ¶ 27,063; Kimmins Contracting Corp., ASBCA No. 46390, 94-2 BCA ¶ 26,869; F.G. Haggerty Plumbing Co., VABCA No. 4482, 95-2 BCA ¶ 27,671.



- b. The contracting officer orders it. See Mergentime Corp., ENG BCA No. 5765, 92-2 BCA ¶ 25,007; Durocher Dock & Dredge, Inc., ENG BCA No. 5768, 91-3 BCA ¶ 24,145. But see Fruehauf Corp. v. United States, 218 Ct. Cl. 456, 587 F.2d 486 (1978); Asphalt Roads & Materials Co., ASBCA No. 43625, 95-1 BCA ¶ 27,544; Henderson, Inc., DOT BCA No. 2423, 94-2 BCA ¶ 26,728; Lane Constr. Corp., ENG BCA No. 5834, 94-1 BCA ¶ 26,358.
  - c. The contractor has not caused the suspension by its (or its subcontractor's) negligence or failure to perform. See Hvac Constr. Co., Inc. v. United States, 28 Fed. Cl. 690 (1993).
  - d. The cost of performance increases. See Missile Sys., Inc., ASBCA No. 46079, 94-3 BCA ¶ 27,091; Frazier-Fleming Co., ASBCA No. 34537, 91-1 BCA ¶ 23,378.
3. The contractor may be entitled to delay costs (even if it finishes work on time) if it proves that it planned to finish the work early, but was delayed by the government. See Oneida Constr., Inc., ASBCA No. 44194, 94-3 BCA ¶ 27,237; Labco Constr., Inc., AGBCA No. 90-115-1, 94-2 BCA ¶ 26,910.
4. The contractor may not recover delay costs where the government provides greater access to a work site for a portion of the performance period, without binding the government to increased access for the duration of the entire contract, and the government then restricts access to the original contract requirements. Atherton Construction, Inc., ASBCA No. 48527, 00-2 BCA ¶ 30,968. (In a family housing renovation contract, the government provided access to more than the contractually required 14 dwelling units for a period of 48 days. Unilateral action by the government, no recovery allowed.)
5. A contractor may be entitled to a performance period extension even if the delay is reasonable. A contractor also may raise government delay as a defense to a default termination or an assessment of liquidated damages. See Farr Bros., Inc., ASBCA No. 42658, 92-2 BCA ¶ 24,991.

6. If both the contractor and the government contribute to a delay and the causes of the delay are so intertwined that the periods and costs of delay cannot be apportioned clearly, neither party can recover for the delay. See Wilner v. United States, 994 F.2d 783, 786 (Fed. Cir. 1993); cf. G. Bliudzius Contractors, ASBCA No. 42366, 93-3 BCA ¶ 26,074.
7. Profit is not recoverable and final payment bars unreserved suspension claims.
8. The clause limits suspensions to 45 days, but suspensions beyond 45 days are treated no different than the initial 45-day suspension. See Debcon, Inc., ASBCA No. 45050, 93-3 BCA ¶ 25,906.
9. Constructive Suspensions.
  - a. A constructive suspension of work may arise if:
    - (1) The government fails to issue a notice to proceed within a reasonable time after contract award. See Marine Constr. & Dredging, Inc., ASBCA No. 38412, 95-1 BCA ¶ 27,286.
    - (2) The government fails to provide timely guidance following a reasonable request for direction. See Tayag Bros. Enters., Inc., ASBCA No. 42097, 94-2 BCA ¶ 26,962.
  - b. A contractor may not recover delay costs for more than 20 days unless the contractor notifies the government of the delay. FAR 52.242-14. This rule, however, is subject to a prejudice test.

F. Permits and Responsibilities. FAR 52.236-7.

1. A contractor must obtain applicable permits and licenses (and comply with applicable laws and regulations) at no additional cost to the government. See GEM Eng'g Co., DOT BCA No. 2574, 94-3 BCA ¶ 27,202; C'n R Indus. of Jacksonville, Inc., ASBCA No. 42209, 91-2 BCA ¶ 23,970; Holk Dev., Inc., ASBCA No. 40137, 90-2 BCA ¶ 22,852. But see Hills Materials v. Rice, 982 F.2d 514 (Fed. Cir. 1992); Hemphill Contracting Co., ENG BCA No. 5698, 94-1 BCA ¶ 26,491.

2. Normally, licensing is a question of responsibility, not responsiveness. See Restec Contractors, Inc., B-245862, Feb. 6, 1992, 92-1 CPD ¶ 154; Computer Support Sys., Inc., B-239034, Aug. 2, 1990, 69 Comp. Gen. 645, 90-2 CPD ¶ 94. But see Bishop Contractors, Inc., B-246526, Dec. 17, 1991, 91-2 CPD ¶ 555.
3. A contractor assumes the risk of loss or damage to its equipment.<sup>12</sup> In addition, a contractor is responsible for injuries to third persons. See Potashnick Constr., Inc., ENG BCA No. 5551, 92-2 BCA ¶ 24,985; Aulson Roofing, Inc., ASBCA No. 37677, 91-1 BCA ¶ 23,720.
4. A contractor is responsible for work in progress until the government accepts it. See Labco Constr., Inc., ASBCA No. 44945, 93-3 BCA ¶ 26,027; Tyler Constr. Co., ASBCA No. 39365, 91-1 BCA ¶ 23,646; D.J. Barclay & Co., ASBCA No. 28908, 88-2 BCA ¶ 20,741. But see Fraser Eng'g Co., VABCA No. 3265, 91-3 BCA ¶ 24,223; Joseph Beck & Assocs., ASBCA No. 31126, 88-1 BCA ¶ 20,428.

---

<sup>12</sup> The contractor may bear similar responsibilities under a Government Furnished Property clause. FAR 52.245-4. See Technical Servs. K.H. Nehlsen GmbH, ASBCA No. 43869, 94-1 BCA ¶ 26,377.

G. Specifications and Drawings. FAR 52.236-21; DFARS 252.236-7001.

1. The omission or misdescription of details of work that are necessary to carry out the intent of the contract drawings and specifications (or are customarily performed) does not relieve a contractor from its obligation to perform the omitted or misdescribed details of work. A contractor must perform as if the drawings and specifications describe the details fully and correctly. See Wood & Co. v. Dep't of Treasury, GSBCA No. 12452-TD, 94-1 BCA ¶ 26,365; Single Ply Sys., Inc., ASBCA No. 42168, 91-2 BCA ¶ 24,032.
2. The contractor must review all drawings before beginning work, and the contractor is responsible for any errors that a reasonable review would have detected. M.A. Mortenson Co., ASBCA 50,383, 00-2 BCA ¶ 30,936, (denying Mortenson's claim based on omissions in construction drawings), But see Wick Constr. Co., ASBCA No. 35378, 89-1 BCA ¶ 21,239.
3. If the specifications contain provisions that conflict with the contract drawings, the specifications govern. The parties may rely on this order of precedence regardless of whether an ambiguity is patent. See Hensel Phelps Constr. Co., 886 F.2d 1296 (Fed. Cir. 1989); Shemya Constructors, ASBCA No. 45251, 94-1 BCA ¶ 26,346; Rohr, Inc., ASBCA No. 44193, 93-2 BCA ¶ 25,871. But see J.S. Alberici Constr. Co v. General Servs. Admin., GSBCA No. 12386, 94-2 BCA ¶ 26,776. Contracts that contain specifications for alternative CLINs are not conflicting. Fort Myer Construction Corporation v. U.S., Fed. Cir. 2000 (unpub. 24 Jan 2000).
4. The government cannot shift the responsibility for defective design specifications to a contractor through the use of a disclaimer. White v. Edsall Const. Co., Inc., 296 F.3d 1081 (Fed. Cir. 2002) (contractor is not obligated to "ferret out" hidden ambiguities and errors in the Government's specifications and designs.)

H. Liquidated Damages (LDs). FAR 11.502; FAR 36.206; FAR 52.211-12, DFARS Subpart 211.5.

1. The government may assess LDs if:
  - a. The parties intended to provide for LDs;
  - b. Anticipated damages attributable to untimely performance were uncertain or difficult to quantify at the time of award; and
  - c. The LDs bear a reasonable relationship to anticipated government losses resulting from delayed completion.

See D.E.W., Inc., ASBCA No. 38392, 92-2 BCA ¶ 24,840; Brooks Lumber Co., ASBCA No. 40743, 91-2 BCA ¶ 23,984; JEM Dev. Corp., ASBCA No. 42645, 91-3 BCA ¶ 24,428; Dave's Excavation, ASBCA No. 35956, 88-3 BCA ¶ 20,911; see also Kingston Constructors Inc. v. Washington Area Transport Authority, 930 F. Supp. 951 (Fed. Cir 1996); P&D Contractors, Inc. v. United States, 25 Cl. Ct. 237 (1992).

2. If the damage forecast was reasonable, the government may assess LDs even if it did not incur any actual damages. See Cegers v. United States, 7 Cl. Ct. 615 (1985); American Constr. Co., ENG BCA No. 5728, 91-2 BCA ¶ 24,009. But see Atlantic Maint. Co., ASBCA No. 40454, 96-2 BCA ¶ 28,323. Using a rate from an agency manual that is part of its procurement regulations is presumed reasonable. See Fred A. Arnold, Inc. v. United States, 18 Cl. Ct. 1 (1989), aff'd in part, 979 F.2d 217 (Fed. Cir. 1992); JEM Dev. Corp., ASBCA No. 45912, 94-1 BCA ¶ 26,407.
3. The government may not assess LDs if a project is substantially complete. See Hill Constr. Corp., ASBCA No. 43615, 93-3 BCA ¶ 25,973; Wilton Corp., ASBCA No. 39876, 93-2 BCA ¶ 25,897.
4. The government may not assess LDs if it is partly responsible for the completion delay. See H.G. Reynolds Co., Inc., ASBCA No. 42351, 93-2 BCA ¶ 25,797.

5. A contractor may be excused from LDs if it shows that the delay was: (a) excusable or beyond its control; and (b) without the fault or negligence of it or its subcontractors. See Potomac Marine & Aviation, Inc., ASBCA No. 42417, 93-2 BCA ¶ 25,865.
6. Contracting officers must ensure that project completion dates are reasonable to avoid having contractors “pad” their bids to protect against LDs.
7. Another contract clause that sets an alternate rate of compensation for standby time may be enforceable, even if it is quite high, if it serves a different purpose in the contract than a liquidated damages clause. See Stapp Towing Co., ASBCA No. 41584, 94-1 BCA ¶ 26,465.

I. Use/Possession Prior to Completion. FAR 52.236-11.

1. The government may take possession of a construction project prior to its completion (beneficial occupancy).
2. Possession does not necessarily constitute acceptance. See Tyler Constr. Co., ASBCA No. 39365, 91-1 BCA ¶ 23,646. The contractor must complete a project as required by the contract, including all “punch list” items. See Toombs & Co., ASBCA No. 34590, 91-1 BCA ¶ 23,403.
3. The contractor is not responsible for any loss or damage that the government causes. See Fraser Eng’g Co., *supra*.
4. The contractor may be due an equitable adjustment if possession by the government causes a delay.

**X. CONCLUSION.**

## ATTACHMENT

### DIFFERING SITE CONDITIONS (DSC)

What a Contractor Must Show to Recover for DSCs.

<b>XI. TYPE I</b>	<b>XII. TYPE II</b>
Contract documents either implicitly or explicitly indicate a particular site condition.	Conditions encountered were unusual physical conditions that were not now about at time of contract award.
Contractor reasonably interpreted and relied upon the contract indications.	Conditions differed materially from those ordinarily encountered.
Contractor encountered latent/subsurface conditions that differed materially from the conditions indicated in the contract and were reasonably unforeseeable.	
Contractor incurred increased costs that were solely attributable to the DSC.	Contractor incurred increased costs that were solely attributable to the DSC.
<u>Note:</u> 1. If the government made no representations and provided no information, contractor cannot recover. 2. If the contractor discovers the differing conditions prior to bid opening, reliance is unreasonable.	<u>Examples:</u> unexpected soil conditions, old dump at site, buried hazardous materials

#### NOTES:

1. DSC clause only covers conditions existing at the time of award. Acts of nature occurring after award are not DSCs.
2. A contractor may not recover if the contractor could have discovered the condition during a reasonable site investigation.
3. Recovery for DSC is not available if the contract does not contain the DSC clause.





## **CHAPTER 15**

### **INSPECTION, ACCEPTANCE, AND WARRANTY**

<b>I. INTRODUCTION.....</b>	<b>1</b>
<b>II. FUNDAMENTAL CONCEPTS OF INSPECTION AND TESTING. ....</b>	<b>1</b>
A. General. ....	1
B. Origin of the Government’s Right to Inspect. ....	2
C. Operation of the Inspection Clauses. ....	3
<b>III. GOVERNMENT REMEDIES UNDER THE INSPECTION CLAUSE.....</b>	<b>6</b>
A. Introduction. ....	6
B. Defective Performance <u>BEFORE</u> the Required Delivery Date. ....	6
C. Defective Performance <u>ON</u> the Required Delivery Date.....	7
D. Defective Performance <u>AFTER</u> the Required Delivery Date. ....	8
E. Remedies if the Contractor Fails to Correct Defective Performance. ....	8
F. Special Rules for Service Contracts. ....	9
<b>IV. STRICT COMPLIANCE VS. SUBSTANTIAL COMPLIANCE. ....</b>	<b>10</b>
A. Strict Compliance. ....	10
B. Substantial Compliance. ....	11
C. Economic Waste.....	12
D. Timing of Termination .....	12
E. Substantial Compliance and Late Delivery? .....	13
<b>V. PROBLEM AREAS IN TESTING AND INSPECTION. ....</b>	<b>13</b>
A. Claims Resulting from Unreasonable Inspections.....	13
B. Waiver, Prior Course of Dealing, and Other Acts Affecting Testing and Inspection. ....	16
<b>VI. ACCEPTANCE. ....</b>	<b>17</b>

A.	Definition .....	17
B.	General Principles of Acceptance.....	17
C.	Exceptions to the Finality of Acceptance.....	19
<b>VII.</b>	<b>WARRANTY. ....</b>	<b>22</b>
A.	General Principles. ....	22
B.	Asserting Warranty Claims. ....	22
C.	Remedies for Breach of Warranty. ....	24
D.	Mitigation of Damages. ....	24

## **CHAPTER 15**

### **INSPECTION, ACCEPTANCE, AND WARRANTY**

#### **I. INTRODUCTION.**

A fundamental goal of the acquisition process is to obtain quality goods and services. In furtherance of this goal, the government inspects tendered supplies or services to insure that they conform with contract requirements. While the right to inspect and test is very broad, it is not without limits. Frequently, government inspectors perform unreasonable inspections, rendering the government liable to the contractor for additional costs. Proper inspections are critical, because once the government accepts a product or service, it cannot revoke its acceptance except in narrowly defined circumstances. Attorneys can contribute to the success of the government procurement process by working with government inspectors and contracting officers to insure that each of these individuals understands the government's rights and obligations regarding inspection, acceptance, and warranty under government contracts.

#### **II. FUNDAMENTAL CONCEPTS OF INSPECTION AND TESTING.**

##### **A. General.**

1. The inspection clauses, which are remedy granting clauses, vest the government with significant rights and remedies. FAR 52.246-2 - 52.246-12.
2. In any dispute, the parties must identify the correct theory of recovery and applicable contractual provisions. The theory of recovery normally flows from a contractual provision. See Morton-Thiokol, Inc., ASBCA No. 32629, 90-3 BCA ¶ 23,207 (government denial of cost reimbursement rejected-board noted government's failure to cite Inspection clause).

B. Origin of the Government's Right to Inspect.

1. The government has the right to inspect to ensure that it receives conforming goods and services. FAR Part 46. The particular inspection clauses contained in a contract, if any, determine the government's right to inspect a contractor's performance.
2. Contract inspections fall into three general categories, depending on the extent of quality assurance needed by the government for the acquisition involved. These include:
  - a. Government reliance on inspection by the contractor (FAR 46.202-2);
  - b. Standard inspection requirements (FAR 46.202-3); and
  - c. Higher-level contract quality requirements (FAR 46.202-4).
3. The FAR contains several different inspection clauses. In determining which clause to use, consider:
  - a. The contract type (e.g., fixed-price, cost-reimbursement, time-and-materials, and labor-hour); and
  - b. The nature of the item procured (e.g., supply, service, construction, transportation, or research and development).
4. Depending upon the specific clauses in the contract, the government has the right to inspect and test supplies, services, materials furnished, work required by the contract, facilities, and equipment at all places and times, and, in any event, before acceptance. See, e.g., FAR 52.246-2 (supplies-fixed-price), -4 (services-fixed-price), -5 (services-cost-reimbursement), -6 (time-and-materials and labor-hour), -8 (R&D-cost-reimbursement), -9 (R&D), -10 (facilities), and -12 (construction).

C. Operation of the Inspection Clauses.

1. Definitions.

- a. “Government contract quality assurance” is “the various functions, including inspection, performed by the Government to determine whether a contractor has fulfilled the contract obligations pertaining to quality and quantity.” FAR 46.101
- b. “Testing” is “that element of inspection that determines the properties or elements of products, including the functional operation of supplies or their components, by the application of established scientific principles and procedures.” FAR 46.101

2. The government may require a contractor to maintain an inspection system that is adequate to ensure delivery of supplies and services that conform to the requirements of the contract. David B. Lilly Co., ASBCA No. 34678, 92-2 BCA ¶ 24,973 (government ordered contractor to submit new inspection plan to eliminate systemic shortcomings in the inspection process).

3. Inspection and testing must *reasonably relate* to the determination of whether performance is in compliance with contractual requirements.

- a. Contractually specified inspections or tests are presumed reasonable unless they conflict with other contract requirements. General Time Corp., ASBCA No. 22306, 80-1 BCA ¶ 14,393.
- b. If the contract specifies a test, the government may not require a higher level of performance than measured by the method specified. United Technologies Corp., Sikorsky Aircraft Div. v. United States, 27 Fed. Cl. 393 (1992).

- c. The government may use tests other than those specified in the contract provided the tests do not impose a more stringent standard of performance. Donald C. Hubbs, Inc., DOT BCA No. 2012, 90-1 BCA ¶ 22,379 (use of rolling straightedge permitted after initial inspection determined that road was substantially nonconforming); Puroflow Corp., ASBCA No. 36058, 93-3 BCA ¶ 26,191 (board upholds government's rejection of First Article Test Report for contractor's failure to perform an unspecified test).
  
- d. Absent contractually specified tests, the government may use any tests that do not impose different or more stringent standards than those required by the contract. Space Craft, Inc., ASBCA No. 47997, 98-1 BCA ¶ 29,341 (government reasonably measured welds on clamp assemblies); Davey Compressor Co., ASBCA No. 38671, 94-1 BCA ¶ 26,433; Al Johnson Constr. Co., ENG BCA No. 4170, 87-2 BCA ¶ 19,952.
  
- e. If the contract specifies no particular tests, consider the following factors in selecting a test or inspection technique:
  - (1) Consider the intended use of the product or service. A-Nam Cong Ty, ASBCA No. 14200, 70-1 BCA ¶ 8,106 (unreasonable to test coastal water barges on the high seas while fully loaded).
  
  - (2) Measure compliance with contractual requirements, and inform the contractor of the standards it must meet. Service Eng'g Co., ASBCA No. 40275, 94-1 BCA ¶ 26,382 (board refused to impose a military standard on contract for ship repair, where contract simply required workmanship in accordance with "best commercial marine practice"); Tester Corp., ASBCA No. 21312, 78-2 BCA ¶ 13,373, mot. for recon. denied, 79-1 BCA ¶ 13,725.
  
  - (3) Use standard industry tests, if available. DiCecco, Inc., ASBCA No. 11944, 69-2 BCA ¶ 7,821 (use of USDA mushroom standards upheld). But see Chelan Packing Co., ASBCA No. 14419, 72-1 BCA ¶ 9,290 (government inspector failed to apply industry standard properly).

- (4) The government must inspect and test correctly. Baifield Indus., Div. of A-T-O, Inc., ASBCA No. 13418, 77-1 BCA ¶ 12,308 (cartridge cases/rounds fired at excessive pressure).
- (5) Generally, the government is not required to perform inspections. Cannon Structures, Inc., AGBCA No. 90-207-1, 93-3 BCA ¶ 26,059.
  - (a) The government's failure to discover defects during inspection does not relieve the contractor of the requirement to tender conforming supplies. FAR 52.246-2(c); George Ledford Constr., Inc., ENGBCA No. 6218, 97-2 BCA ¶ 29,172.
  - (b) However, the government may not unreasonably deny a contractor's request to perform preliminary or additional testing. Alonso & Carus Iron Works, Inc., ASBCA No. 38312, 90-3 BCA ¶ 23,148 (no liability for defective fuel tank because government refused to allow a preliminary water test not prohibited by the contract); Praoil, S.R.L., ASBCA No. 41499, 94-2 BCA ¶ 26,840 (government unreasonably refused contractor's request, per industry practice, to perform retest of fuel; termination for default overturned).
- (6) Requiring a contractor to perform tests not specified in the contract may entitle the contractor to an equitable adjustment of the contract price. CBI NA-CON, Inc., ASBCA No. 42268, 93-3 BCA ¶ 26,187.

### III. GOVERNMENT REMEDIES UNDER THE INSPECTION CLAUSE.

#### A. Introduction.

1. The inspection clauses give the government significant remedies. FAR 46.407; FAR 52.246; DFARS 246.407
2. The government's remedies under the inspection clauses operate in two phases. Initially, the government may demand correction of deficiencies. If this proves to be unsuccessful, the government may obtain corrective action from other sources.
3. Under the inspection clauses, the government's remedies depend upon when the contractor delivers nonconforming goods or services.

#### B. Defective Performance **BEFORE** the Required Delivery Date.

1. If the contractor delivers defective goods or services before the required delivery date, the government may:
  - a. Reject the tendered product or performance. Andrews, Large & Whidden, Inc. and Farmville Mfg. Corp., ASBCA No. 30060, 88-2 BCA ¶ 20,542 (government demand for replacement of non-conforming windows sustained); But see Centric/Jones Constr., IBCA No. 3139, 94-1 BCA ¶ 26,404 (government failed to prove that rejected work was noncompliant with specifications; contractor entitled to equitable adjustment for performing additional tests to secure government acceptance);
  - b. Require the contractor to correct the nonconforming goods or service, giving the contractor a reasonable opportunity to do so. Premiere Bldg. Servs., Inc., B-255858, Apr. 12, 1994, 94-1 CPD ¶ 252 (government may charge reinspection costs to contractor); or,



c. Accept the nonconforming goods or services at a reduced price. Federal Boiler Co., ASBCA No. 40314, 94-1 BCA ¶ 26,381 (change in cost of performance to the contractor, not the damages to the government, is the basis for adjustment); Blount Bros. Corp., ASBCA No. 29862, 88-2 BCA ¶ 20,644 (government entitled to a credit totaling the amount saved by contractor for using nonconforming concrete). See also Valley Asphalt Corp., ASBCA No. 17595, 74-2 BCA ¶ 10,680 (although runway built to wrong elevation, only nominal price reduction allowed because no loss in value to the government).

2. The government may not terminate the contract for default based on the tender of nonconforming goods or services before the required delivery date.

C. Defective Performance ON the Required Delivery Date.

1. If the contractor delivers nonconforming goods or services on the required delivery date, the government may:

a. Reject or require correction of the nonconforming goods or services;

b. Reduce the contract price and accept the nonconforming product; or

c. Terminate for default if performance is not in substantial compliance with the contract requirements. See FAR 52.249-6 to 52.249-10. When the government terminates a contract for default, it acquires rights and remedies under the Termination Clause, including the right to reprocure supplies or services similar to those terminated and charge the contractor the additional costs. See FAR 52.249-8(b).

2. If the contractor has complied substantially with the requirements of the contract, the government must give the contractor notice and the opportunity to correct minor defects before terminating the contract for default. Radiation Tech., Inc. v. United States, 366 F.2d 1003 (Ct. Cl. 1966).

D. Defective Performance **AFTER** the Required Delivery Date.

1. Generally, the government may terminate the contract for default.
2. If the contractor has complied substantially with the requirements of the contract, albeit after the required delivery date, the government should give the contractor notice of the defects and an opportunity to correct them. See Franklin E. Penny Co. v. United States, 524 F.2d 668 (Ct. Cl. 1975) (late nonconforming goods may substantially comply with contract requirements).
3. The government may accept nonconforming goods or services at a reduced price.

E. Remedies if the Contractor Fails to Correct Defective Performance.

If the contractor fails to correct defective performance after receiving notice and a reasonable opportunity to correct the work, the government may:

1. Contract with a commercial source to correct or replace the defective goods or services (obtaining funding is often difficult and may make this remedy impracticable), George Bernadot Co., ASBCA No. 42943, 94-3 BCA ¶ 27,242; Zimcon Professionals, ASBCA Nos. 49346, 51123, 00-1 BCA ¶ 30,839 (Government may contract with a commercial source to correct or replace the defective goods or services and may charge cost of correction to original contractor);
2. Correct or replace the defective goods or services itself;
3. Accept the nonconforming goods or services at a reduced price, or;
4. Terminate the contract for default. FAR 52.246-4(f); Firma Tiefbau Meier, ASBCA No. 46951, 95-1 BCA ¶ 27,593.

F. Special Rules for Service Contracts.

1. The inspection clause for fixed-price service contracts, FAR 52.246-4, is different than FAR 52.246-2, which pertains to fixed-price supply contracts.
2. The government's remedies depend on whether it is possible for the contractor to perform the services correctly.
  - a. Normally, the government should permit the contractor to re-perform the services and correct the deficiencies, if possible. Pearl Properties, HUD BCA No. 95-C-118-C4, 96-1 BCA ¶ 28,219 (government's failure to give contractor notice and an opportunity to correct deficient performance waived right to reduce payment).
  - b. Otherwise, the government may:
    - (1) Require the contractor to take adequate steps to ensure future compliance with the contract requirements; and
    - (2) Reduce the contract price to reflect the reduced value of services received. Teltara, Inc., ASBCA No. 42256, 94-1 BCA ¶ 26,485 (government properly used random sampling inspections to calculate contract price reductions); Orlando Williams, ASBCA No. 26099, 84-1 BCA ¶ 16,983 (although termination for default (T4D) of janitorial contract was sustained, the government acted unreasonably by withholding maximum payments when some work had been performed satisfactorily). Even if it reduces the contract price, the government may also recover consequential damages. Hamilton Securities Advisory Servs., Inc. v. United States, 46 Fed. Cl. 164 (2000).

- c. Authorities disagree about whether the same failure in contract performance can support both a reduction in contract price and a termination for default. Compare W.M. Grace, Inc., ASBCA No. 23076, 80-1 BCA ¶ 14,256 (monthly deductions due to poor performance waived right to T4D during those months) and Wainwright Transfer Co., ASBCA No. 23311, 80-1 BCA ¶ 14,313 (deduction for HHG shipments precluded termination) with Cervetto Bldg. Maint. Co. v. United States, 2 Cl. Ct. 299 (1983) (reduction in contract price and termination cumulative remedies).

#### IV. STRICT COMPLIANCE VS. SUBSTANTIAL COMPLIANCE.

##### A. Strict Compliance.

1. As a general rule, the government is entitled to strict compliance with its specifications. Blake Constr. Co. v. United States, 28 Fed. Cl. 672 (1993); De Narde Construction Co., ASBCA No. 50288, 00-2 BCA ¶ 30,929 (government entitled to type of rebar it ordered, even if contrary to trade practice). See also Cascade Pac. Int'l v. United States, 773 F.2d 287 (Fed. Cir. 1985); Ace Precision Indus., ASBCA No. 40307, 93-2 BCA ¶ 25,629 (government rejection of line block final assemblies that failed to meet contract specifications was proper). But see Zeller Zentralheizungsbau GmbH, ASBCA No. 43109, 94-2 BCA ¶ 26,657 (government improperly rejected contractor's use of "equal" equipment where contract failed to list salient characteristics of brand name equipment).
2. Contractors must comply with specifications even if they vary from standard commercial practice. R.B. Wright Constr. Co. v. United States, 919 F.2d 1569 (Fed. Cir. 1990) (contract required three coats over painted surface although commercial practice was to apply only two); Graham Constr., Inc., ASBCA No. 37641, 91-2 BCA ¶ 23,721 (specification requiring redundant performance sustained).
3. Slight defects are still defects. Mech-Con Corp., GSBCA No. 8415, 88-3 BCA ¶ 20,889 (installation of 2" pipe insulation did not satisfy 1½" requirement).

B. Substantial Compliance.

1. “Substantial compliance” is a judicially created concept to avoid the harsh result of termination for default based upon a minor breach, and to avoid economic waste. The concept originated in construction contracts and has been extended to other types of contracts. See Radiation Tech., Inc. v. United States, 366 F.2d 1003 (Ct. Cl. 1966).
2. Substantial compliance gives the contractor the right to attempt to cure defective performance. The elements of substantial compliance are:
  - a. Timely delivery;
  - b. Contractor’s good faith belief that it has complied with the contract’s requirements, See Louisiana Lamps & Shades, ASBCA No. 45294, 95-1 BCA ¶ 27,577 (no substantial compliance because contractor had attempted unsuccessfully to persuade government to permit substitution of American-made sockets for specified German-made sockets);
  - c. Minor defects;
  - d. Defects that can be corrected within a reasonable time; and
  - e. Time is not of the essence, i.e., the government does not require strict compliance with the delivery schedule.
3. Generally, the doctrine of substantial compliance does not require the government to accept defective performance by the contractor. Cosmos Eng’rs, Inc., ASBCA No. 19780, 77-2 BCA ¶ 12,713.

C. Economic Waste.

1. The doctrine of economic waste requires the government to accept noncompliant construction if the work, as completed, is suitable for its intended purpose and the cost of correction would far exceed the gain that would be realized. Granite Constr. Co. v. United States, 962 F.2d 998 (Fed. Cir. 1992), cert. denied, 113 S. Ct. 965 (1993); A.D. Roe Co., Inc., ASBCA No. 48782, 99-2 BCA ¶ 30,398 (economic waste is exception to general rule that government can insist on strict compliance with contract terms).
2. To be “suitable for its intended purpose,” the work must substantially comply with the contract. Amtech Reliable Elevator Co. v. General Servs. Admin., GSBCA No. 13184, 95-2 BCA ¶ 27,821 (no economic waste where contractor used conduits for fire alarm wiring which were not as sturdy as required by specifications and lacked sufficient structural integrity); Triple M Contractors, ASBCA No. 42945, 94-3 BCA ¶ 27,003 (no economic waste where initial placement of reinforcing materials in drainage gutters reduced useful life from 25 to 20 years); Shirley Constr. Corp., ASBCA No. 41908, 93-3 BCA ¶ 26,245 (concrete slab not in substantial compliance even though it could support the design load; without substantial compliance, doctrine of economic waste inapplicable); Valenzuela Engineering, Inc., ASBCA No. 53608, 53936, 04-1 BCA ¶ 32,517 (absent expert testimony, government can demand strict performance for structure designed to contain explosions).

D. Timing of Termination

1. Except in those rare situations involving economic waste, the doctrine of substantial compliance affects only **when** the government may terminate for default.
2. It does not preclude termination for default if the contractor fails to correct defective performance. The government:
  - a. Must give the contractor a reasonable amount of time to correct its work, including, if necessary, an extension beyond the original required delivery date.

- b. May terminate for default if the contractor fails to correct defects within a reasonable period of time. Firma Tiefbau Meier, ASBCA No. 46951, 95-1 BCA ¶ 27,593 (termination for default justified by contractor's repeated refusal to correct defective roof panels).

E. Substantial Compliance and Late Delivery?

- 1. Radiation Technology, supra, established the concept of substantial compliance for the timely delivery of nonconforming goods. Franklin E. Penny Co. v. United States, supra, arguably expanded the concept to include late delivery of nonconforming goods.
- 2. The courts and boards have not widely followed Penny; however, they have not overruled it.

**V. PROBLEM AREAS IN TESTING AND INSPECTION.**

A. Claims Resulting from Unreasonable Inspections.

- 1. Government inspections may give rise to equitable adjustment claims if they delay the contractor's performance or cause additional work. The government:
  - a. Must perform reasonable inspections. FAR 52.246-2. Donald C. Hubbs, Inc., DOT BCA No. 2012, 90-1 BCA ¶ 22,379 (more sophisticated test than specified, rolling straightedge, was reasonable).

- b. Must avoid overzealous inspections. The government may not inspect to a level beyond that authorized by the contract. Overzealous inspection may impact adversely upon the government's ability to reject the contractor's performance, to assess liquidated damages, or to otherwise assert its rights under the contract. See The Libertatia Associates, Inc., 46 Fed. Cl. 702 (2000) (COR told contractor's employees that he was Jesus Christ and that CO was God); Gary Aircraft Corp., ASBCA No. 21731, 91-3 BCA ¶ 24,122 ("overnight change" in inspection standards was unreasonable); Donohoe Constr. Co., ASBCA No. 47310, 98-2 BCA ¶ 30,076, motion for reconsideration granted in part on other grounds, ASBCA No. 47310, 99-1 BCA ¶ 30,387 (government quality control manager unreasonably rejected proposed schedules, ignored contractor submissions for weeks, and told contractor he would "get even" with him).
- c. Must resolve ambiguities involving inspection requirements in a timely manner. P & M Indus., ASBCA No. 38759, 93-1 BCA ¶ 25,471.
- d. Must exercise reasonable care when performing tests and inspections prior to acceptance of products or services, and may not rely solely on destructive testing of products after acceptance to discover a deficiency it could have discovered before acceptance. Ahern Painting Contractors, Inc., GSBCA No. 7912, 90-1 BCA ¶ 22,291.

2. Improper inspections:

- a. May excuse a contractor's delay, thereby delaying or preventing termination for default. Puma Chem. Co., GSBCA No. 5254, 81-1 BCA ¶ 14,844 (contractor justified in refusing to proceed when government test procedures subjected contractor to unreasonable risk of rejection).



- b. May justify claims for increased costs of performance under the delay of work or changes clauses in the contract. See, e.g., Hull-Hazard, Inc., ASBCA No. 34645, 90-3 BCA ¶ 23,173 (contract specified joint inspection, however, government conducted multiple inspections and bombarded contractor with “punch lists”); H.G. Reynolds Co., ASBCA No. 42351, 93-2 BCA ¶ 25,797; Harris Sys. Int’l, Inc., ASBCA No. 33280, 88-2 BCA ¶ 20,641 (10% “spot mopping” specified, government demanded 100% for “uniform appearance”). But see Trans Western Polymers, Inc. v. Gen. Servs. Admin., GSBGA No. 12440, 95-1 BCA ¶ 27,381 (government properly performed lot by lot inspection after contractor failed to maintain quality control system); Space Dynamics Corp., ASBCA No. 19118, 78-1 BCA ¶ 12,885 (defects in aircraft carrier catapult assemblies justified increased government inspection).
    - c. May give rise to a claim of government breach of contract. Adams v. United States, 358 F.2d 986 (Ct. Cl. 1966) (government breached contract when inspector disregarded inspection plan, doubled inspection points, complicated construction, delayed work, increased standards, and demanded a higher quality tent pin than specified); Electro-Chem Etch Metal Markings, Inc., GSBGA No. 11785, 93-3 BCA ¶ 26,148. But see Southland Constr. Co., VABCA No. 2217, 89-1 BCA ¶ 21,548 (government engineer’s “harsh and vulgar” language, when appellant contributed to the tense atmosphere, did not justify refusal to continue work) Olympia Reinigung GmbH, ASBCA Nos. 50913, 51225, 51258, 02-2 BCA ¶ 32,050 (allegation of aggressive government inspections did not render contract termination for default arbitrary or capricious).
3. It is a constructive change to test a standard commercial item to a higher level of performance than is required in commercial practice. Max Blau & Sons, Inc., GSBGA No. 9827, 91-1 BCA ¶ 23,626 (insistence on extensive deburring and additional paint on a commercial cabinet was a constructive change).
4. Government breach of its duty to cooperate with the contractor may shift the cost of damages caused by testing to the government. See Alonso & Carus Iron Works, Inc., ASBCA No. 38312, 90-3 BCA ¶ 23,148 (government refusal to permit reasonable, preliminary test proposed by contractor shifted the risk of loss to the government).

- B. Waiver, Prior Course of Dealing, and Other Acts Affecting Testing and Inspection.
1. By his actions, an authorized government official may waive contractual requirements if the contractor reasonably believes that a required specification has been suspended or waived. Gresham & Co. v. United States, 470 F.2d 542, 554 (Ct. Cl. 1972), Perkin-Elmer's Corp. v. United States, 47 Fed. Cl. 672 (2000).
  2. The government may also be estopped from enforcing a contract requirement. The elements of equitable estoppel are:
    - a. Authorized government official;
    - b. Knowledge by government official of true facts;
    - c. Ignorance by contractor of true facts; and
    - d. Detrimental reliance by the contractor. Longmire Coal Corp., ASBCA No. 31569, 86-3 BCA ¶ 19,110.
  3. Normally, previous government acceptance of similar nonconforming performance is insufficient to demonstrate waiver of specifications.
    - a. Government acceptance of nonconforming performance by other contractors normally does not waive contractual requirements. Moore Elec. Co., ASBCA No. 33828, 87-3 BCA ¶ 20,039 (government's allowing deviation to another contractor on prior contract for light pole installation did not constitute waiver, even where both contractors used the same subcontractor).
    - b. Government acceptance of nonconforming performance by the same contractor normally does not waive contractual requirements. Basic Marine, Inc., ENG BCA No. 5299, 87-1 BCA ¶ 19,426.

4. Numerous government acceptances of similar nonconforming performance by the same contractor may waive the requirements of that particular specification. Gresham & Co. v. United States, 470 F.2d 542 (Ct. Cl. 1972) (acceptance of dishwashers without detergent dispensers eventually waived requirement to equip with dispensers); Astro Dynamics, Inc., ASBCA No. 28381, 88-3 BCA ¶ 20,832 (acceptance of seven shipments of rocket tubes with improper dimensions precluded termination for default for same reason on the eighth shipment). But see Kvasz Constr. Co., ASBCA No. 45965, 94-1 BCA ¶ 26,513 (Navy's acceptance on four prior construction contracts of "expansion compensation devices" for a heat distribution system did not waive contract requirement for "expansion loops").
5. Generally, an inspector's failure to require correction of defects is insufficient to waive the right to demand correction. Hoboken Shipyards, Inc., DOT BCA No. 1920, 90-2 BCA ¶ 22,752 (government not bound by an inspector's unauthorized agreement to accept improper type of paint if a second coat was applied).

## VI. ACCEPTANCE.

### A. Definition.

Acceptance is the "act of an authorized representative of the government that asserts ownership of identified supplies tendered or approves specific services rendered as partial or complete performance of the contract." FAR 46.101.

### B. General Principles of Acceptance.

1. Acceptance is conclusive except for latent defects, fraud, gross mistakes amounting to fraud, or as otherwise provided for in the contract, e.g., warranties. FAR 52.246-2(k); Hogan Constr., Inc., ASBCA No. 39014, 95-1 BCA ¶ 27,398 (government improperly terminated contract for default after acceptance).
2. Acceptance entitles the contractor to payment and is the event that marks the passage of title from the contractor to the government.

3. The government generally uses a DD Form 250 to expressly accept tendered goods or services.
4. The government may impliedly accept goods or services by:
  - a. Making final payment. Norwood Precision Prods., ASBCA No. 24083, 80-1 BCA ¶ 14,405. See also Farruggio Constr. Co., DOT CAB No. 75-2-75-2E, 77-2 BCA ¶ 12,760 (progress payments on wharf sheeting contract did not shift ownership and risk of loss to the government). Note, however, that payment, even if no more monies are due under a contract, does not necessarily constitute final acceptance. Spectrum Leasing Corp., GSBCA No. 7347, 90-3 BCA ¶ 22,984 (no acceptance because contract provided that final testing and acceptance would occur after the last payment). See also Ortech, Inc., ASBCA No. 52228, 00-1 BCA ¶ 30,764 (A contractor's acceptance of final payment from the government may preclude a later claim by the contractor).
  - b. Unreasonably delaying acceptance. See, e.g., Cudahy Packing Co. v. United States, 75 F. Supp. 239 (Ct. Cl. 1948) (government took two months to reject eggs); Mann Chem. Labs, Inc. v. United States, 182 F. Supp. 40 (D. Mass. 1960).
  - c. Using or changing a product. Ateron Corp., ASBCA No. 46,867, 96-1 BCA ¶ 28,165 (government use of products inconsistent with contractor's ownership); The Interlake Cos. v. General Servs. Admin., GSBCA No. 11876, 93-2 BCA ¶ 25,813 (government improperly rejected material handling system after government changes rendered computer's preprogrammed logic useless).
5. Unconditional acceptance of partial deliveries may waive the right to demand that the final product perform satisfactorily. See Infotec Dev., Inc., ASBCA No. 31809, 91-2 BCA ¶ 23,909 (multi-year contract for Minuteman Missile software).

6. As a general rule, contractors bear the risk of loss or damage to the contract work prior to acceptance. See FAR 52.246-16, Responsibility for Supplies (supply); FAR 52.236-7, Permits and Responsibilities (construction). See also Meisel Rohrbau GmbH, ASBCA No. 40012, 92-1 BCA ¶ 24,716 (damage caused by children); DeRalco Corp., ASBCA No. 41306, 91-1 BCA ¶ 23,576 (structure destroyed by 180 MPH hurricane winds although construction was 97% complete and only required to withstand 100 MPH winds); G&C Enterprises, Inc. v. United States, 55 Fed. Cl. 424 (2003) (no formal acceptance where structure destroyed by windstorm after project 99% complete and Army had begun partial occupation) .
  - a. If the contract specifies f.o.b. destination, the contractor bears the risk of loss during shipment even if the government accepted the supplies prior to shipment. FAR 52.246-16; KAL M.E.I. Mfg. & Trade Ltd., ASBCA No. 44367, 94-1 BCA ¶ 26,582 (contractor liable for full purchase price of cover assemblies lost in transit, even though cover assemblies had only scrap value).
  - b. In construction contracts, the government may use and possess the building prior to completion. FAR 52.236-11, Use and Possession Prior to Completion. The contractor is relieved of responsibility for loss of or damage to work resulting from the government's possession or use. See Fraser Eng'g Co., VABCA No. 3265, 91-3 BCA ¶ 24,223 (government responsible for damaged cooling tower when damage occurred while tower was in its sole possession and control).

C. Exceptions to the Finality of Acceptance.

1. Latent defects may enable the government to avoid the finality of acceptance. To be latent, a defect must have been:
  - a. Unknown to the government. See Gavco Corp., ASBCA No. 29763, 88-3 BCA ¶ 21,095;

- b. In existence at the time of acceptance. See Santa Barbara Research Ctr., ASBCA No. 27831, 88-3 BCA ¶ 21,098; mot. for recon. denied, 89-3 BCA ¶ 22,020 (failure to prove crystalline growths were in laser diodes at the time of acceptance and not reasonably discoverable); and
    - c. Not discoverable by a reasonable inspection. Munson Hammerhead Boats, ASBCA No. 51377, 00-2 BCA ¶ 31,143 (defects in boat surface, under paint and deck covering, not reasonably discoverable by government till four months later); Stewart & Stevenson Services, Inc., ASBCA No. 52140, 00-2 BCA ¶ 31,041 (government could revoke acceptance even though products passed all tests specified in contract); Wickham Contracting Co., ASBCA No. 32392, 88-2 BCA ¶ 20,559 (failed spliced telephone and power cables were latent defects and not discoverable); Dale Ingram, Inc., ASBCA No. 12152, 74-1 BCA ¶ 10,436 (mahogany plywood was not a latent defect because a visual examination would have disclosed); *But see Perkin-Elmer Corp. v. United States*, 47 Fed. Cl. 672 (2000) (six years was too long to wait before revoking acceptance based on latent defect).
2. Contractor fraud allows the government to avoid the finality of acceptance. See D&H Constr. Co., ASBCA No. 37482, 89-3 BCA ¶ 22,070 (contractors' use of counterfeited National Sanitation Foundation and Underwriters' Laboratories labels constituted fraud). To establish fraud, the government must prove that:
  - a. The contractor intended to deceive the government;
  - b. The contractor misrepresented a material fact; and
  - c. The government relied on the misrepresentation to its detriment. BMV – Combat Sys. Div. Of Harsco Corp., 38 Fed.Cl. 109 (1997) (contractor's knowing misrepresentation of adequate testing was fraud); United States v. Aerodex, Inc., 469 F.2d 1003 (5th Cir. 1972).
3. A gross mistake amounting to fraud may avoid the finality of acceptance. The elements of a gross mistake amounting to fraud are—

- a. A major error causing the government to accept nonconforming performance;
  - b. The contractor's misrepresentation of a fact, Bender GmbH, ASBCA No. 52266, 2004-1 B.C.A. (CCH) ¶ 32,474 (repeated false invoices in "wonton disregard of the facts" allowed government to revoke final acceptance); and
  - c. Detrimental government reliance on the misrepresentation. Z.A.N. Co., ASBCA No. 25488, 86-1 BCA ¶ 18,612 (gross mistake amounting to fraud established where the government relied on Z.A.N. to verify watch caliber and Z.A.N. accepted watches from subcontractor without proof that the caliber was correct);
4. Warranties. Warranties operate to revoke acceptance if the nonconformity is covered by the warranty.
  5. Revocation of Acceptance.
    - a. Once the government revokes acceptance, its normal rights under the inspection, disputes, and default clauses of the contract are revived. FAR 52.246-2(l) (Inspection-Supply clause expressly revives rights); Spandome Corp. v. United States, 32 Fed. Cl. 626 (1995) (government revoked acceptance, requested contractor to repair structure, and demanded return of purchase price when contractor refused); Jo-Bar Mfg. Corp., ASBCA No. 17774, 73-2 BCA ¶ 10,311 (contractor's failure to heat treat aircraft bolts entitled government to recover purchase price paid). Cf. FAR 52.246-12 (Inspection-Construction clause is silent on reviving rights).
    - b. Failure to timely exercise revocation rights may waive the government's contractual right to revoke acceptance. Perkin-Elmer's Corp. v. United States, 47 Fed. Cl. 672 (2000) (Air Force attempted to revoke acceptance of "portable wear metal analyzer" six years after acceptance; Court of Federal Claims held the six-year delay in revoking acceptance was unreasonable, thus prohibiting government recovery on the claim).

## **VII. WARRANTY.**

### **A. General Principles.**

1. Warranties may extend the period for conclusive government acceptance. FAR 46.7; DFARS 246.7; AR 700-139, ARMY WARRANTY PROGRAM (9 Feb 04).
2. Warranties may be express or implied. Fru-Con Constr. Corp., 42 Fed. Cl. 94 (1998) (design specifications result in an implied warranty; no implied warranty with performance specifications because of the broader discretion afforded the contractor in their implementation).
3. Normally, warranties are defined by the time and scope of coverage.
4. The use of warranties is not mandatory. FAR 46.703. In determining whether a warranty is appropriate for a specific acquisition, consider:
  - a. Nature and use of the supplies or services;
  - b. Cost;
  - c. Administration and enforcement;
  - d. Trade practice; and
  - e. Reduced quality assurance requirements, if any.
  - f. GSA schedule contracts may no longer routinely provide commercial warranties.

### **B. Asserting Warranty Claims.**

1. When asserting a warranty claim, the government must prove:



- a. That there was a defect when the contractor completed performance. Vistacon Inc. v. General Servs. Admin., GSBCA No. 12580, 94-2 BCA ¶ 26,887;
  - b. That the warranted defect was the most probable cause of the failure. Hogan Constr., Inc., ASBCA No. 38801, 95-1 BCA ¶ 27,396, A.S. McGaughan Co., PSBCA No. 2750, 90-3 BCA ¶ 23,229; R.B. Hazard, Inc., ASBCA No. 41061, 91-2 BCA ¶ 23,709 (government denied recovery under warranty theory because it failed to prove that pump failure was not the result of government misuse and that defective material or workmanship was the most probable cause of the damage);
  - c. That the defect was within the scope of the warranty;
  - d. That the defect arose during the warranty period;
  - e. That the contractor received notice of the defect and its breach of the warranty, Land O’Frost, ASBCA Nos. 55012, 55241, 2003 B.C.A. (CCH) ¶ 32,395 (Army’s warranty claim failed to provide specific notice of a defect covered by the warranty); and
  - f. The cost to repair the defect, if not corrected by the contractor. Hoboken Shipyards, Inc., DOT BCA No. 1920, 90-2 BCA ¶ 22,752. See Globe Corp., ASBCA No. 45131, 93-3 BCA ¶ 25,968 (board reduced government’s claim against the contractor because the government inconsistently allocated the cost of repairing the defects).
2. The government may invalidate a warranty through improper maintenance, operation, or alteration.
  3. A difficult problem in administering warranties on government contracts is identifying and reporting defects covered by the warranty.
  4. Warranty clauses survive acceptance. Shelby’s Gourmet Foods, ASBCA No. 49883, 01-1 BCA ¶ 31,200 (government entitled to reject defective “quick-cooking rolled oats” under warranty even after initial acceptance).

C. Remedies for Breach of Warranty.

The FAR provides the basic outline for governmental remedies. See FAR 52.246-17 and 52.246-18. If the contractor breaches a warranty clause, the government may—

1. Order the contractor to repair or replace the defective product;
2. Retain the defective product at a reduced price;
3. Correct the defect in-house or by contract if the contractor refuses to honor the warranty; or
4. Permit an equitable adjustment in the contract price. However, the adjustment cannot reduce the price below the scrap value of the product.

D. Mitigation of Damages.

1. The government must attempt to mitigate its damages.
2. The government may recover consequential damages. Norfolk Shipbldg. and Drydock Corp., ASBCA No. 21560, 80-2 BCA ¶ 14,613 (government entitled to cost of repairs caused by ruptured fuel tank).

## **CHAPTER 16**

### **CONTRACT DISPUTES ACT (CDA) CLAIMS**

I.	INTRODUCTION..	1
II.	OVERVIEW.	1
	A. Historical Development.	1
	B. The Disputes Process.	4
III.	APPLICABILITY OF THE DISPUTES CLAUSE.	6
	A. Appropriated Fund Contracts.	6
	B. Nonappropriated Fund (NAF) Contracts.	7
IV.	CONTRACTOR CLAIMS.	8
	A. Proper Claimants.	8
	B. Definition of a Claim.	9
	C. Elements of a Claim.	10
	D. Demand for a Sum Certain.	17
	E. Supporting Data...	19
	F. Settlement.	19
	G. Interest.	19
	H. Termination for Convenience (T4C) Settlement Proposals.	20
	I. Statute of Limitations.	22
V.	GOVERNMENT CLAIMS.	22
	A. Requirement for Final Decision.	22
	B. Contractor Notice.	24

C. Certification.....	24
D. Interest.....	24
E. Finality.....	24
VI. FINAL DECISIONS.....	24
A. General.....	24
B. Time Limits.....	25
C. Format.....	26
D. Delivery.....	27
E. Independent Act of a Contracting Officer.....	28
F. Finality.....	29
VII. APPEALS TO THE ARMED SERVICES BOARD OF CONTRACT APPEALS.....	30
A. The Right to Appeal.....	30
B. The Armed Services Board of Contract Appeals (ASBCA).....	30
C. Jurisdiction.....	31
D. Standard of Review.....	31
E. Perfecting an Appeal.....	31
F. Regular Appeals.....	33
G. Accelerated Appeals.....	37
H. Expedited Appeals.....	37
I. Remedies.....	38
J. Payment of Judgments.....	39
K. Appealing an Adverse Decision.....	39
VIII. ACTIONS BEFORE THE COURT OF FEDERAL CLAIMS (COFC).....	40

A. The Right to Appeal.....	40
B. The Court of Federal Claims (COFC). ....	40
C. Jurisdiction.....	40
D. Standard of Review.....	41
E. Perfecting an Appeal.....	41
F. Procedures.....	43
G. Remedies.....	44
H. Payment of Judgments. ....	44
I. Appealing an Adverse Decision. ....	44
IX. APPEALS TO THE COURT OF APPEALS FOR THE FEDERAL CIRCUIT (CAFC)...	44
A. National Jurisdiction.....	44
B. Standard of Review.....	45
C. Frivolous Appeals.....	45
D. Supreme Court Review.....	45
X. CONTRACT ATTORNEY RESPONSIBILITIES IN THE DISPUTES PROCESS. ....	45
A. Actions upon Receipt of a Claim.....	45
B. Contracting Officer's Final Decision.....	46
C. R4 File.....	46
D. Discovery.....	46
E. Hearings.....	47
F. Client Expectations.....	47
G. Settlement. ....	47
XI. CONCLUSION.....	47

ATTACHMENT – DISPUTES CLAUSES.....	49
------------------------------------	----

## **CHAPTER 16**

### **CONTRACT DISPUTES ACT (CDA) CLAIMS**

#### **I. INTRODUCTION.** As a result of this instruction, the student will understand:

- A. The claims submission and dispute resolution processes provided by the CDA.
- B. The jurisdiction of the Armed Services Board of Contract Appeals (ASBCA) and the U.S. Court of Federal Claims (COFC) to decide appeals from contracting officer final decisions.
- C. The role of the contract attorney in addressing contractor claims, defending against contractor appeals, and prosecuting government claims.

#### **II. OVERVIEW.**

- A. Historical Development.
  - 1. Pre-Civil War Developments. Before 1855, government contractors had no forum in which to sue the United States. In 1855, the Congress created the Court of Claims as an Article I (legislative) court to consider claims against the United States and recommend private bills to Congress. Act of February 24, 1855, 10 Stat. 612. The service secretaries, however, continued to resolve most contract claims. As early as 1861, the Secretary of War appointed a board of three officers to consider and decide specific contract claims. See Adams v. United States, 74 U.S. 463 (1868). Upon receipt of an adverse board decision, a contractor's only recourse was to request a private bill from Congress.

2. Civil War Reforms. In 1863, Congress expanded the power of the Court of Claims by authorizing it to enter judgments against the United States. Act of March 3, 1863, 12 Stat. 765. In 1887, Congress passed the Tucker Act to expand and clarify the jurisdiction of the Court of Claims. Act of March 3, 1887, 24 Stat. 505, codified at 28 U.S.C. § 1491. In that Act, Congress granted the Court of Claims authority to consider monetary claims based on: (1) the Constitution; (2) an act of Congress; (3) an executive regulation; or (4) an express or implied-in-fact contract.<sup>1</sup> As a result, a government contractor could now sue the United States as a matter of right.
3. Disputes Clauses. Agencies responded to the Court of Claim's increased oversight by adding clauses to government contracts that appointed specific agency officials (e.g., the contracting officer or the service secretary) as the final decision-maker for questions of fact. The Supreme Court upheld the finality of these officials' decisions in Kihlberg v. United States, 97 U.S. 398 (1878). The tension between the agencies' desire to decide contract disputes without outside interference, and the contractors' desire to resolve disputes in the Court of Claims, continued until 1978. This tension resulted in considerable litigation and a substantial body of case law.
4. Boards of Contract Appeals (BCAs). During World War I (WWI), the War and Navy Departments established full-time BCAs to hear claims involving wartime contracts. The War Department abolished its board in 1922, but the Navy board continued in name (if not fact) until World War II (WWII). Between the wars, an interagency group developed a standard disputes clause. This clause made contracting officers' decisions final as to all questions of fact. WWII again showed that boards of contract appeals were needed to resolve the massive number of wartime contract disputes. See Penker Constr. Co. v. United States, 96 Ct. Cl. 1 (1942). Thus, the War Department created a board of contract appeals, and the Navy revived its board. In 1949, the Department of Defense (DOD) merged the two boards to form the current ASBCA.

---

<sup>1</sup> The Tucker Act did not give the Court of Claims authority to consider claims based on implied-in-law contracts.



5. Post-WWII Developments. In a series of cases culminating in Wunderlich v. United States, 342 U.S. 98 (1951), the Supreme Court upheld the finality (absent fraud) of factual decisions issued under the disputes clause by a department head or his duly authorized representative. Congress reacted by passing the Wunderlich Act, 41 U.S.C. §§ 321-322, which reaffirmed that the Court of Claims could review factual and legal decisions by agency BCAs. At about the same time, Congress changed the Court of Claims from an Article I (legislative) to an Article III (judicial) court. Pub. L. No. 83-158, 67 Stat. 226 (1953). Later, the Supreme Court clarified the relationship between the Court of Claims and the agency BCAs by limiting the jurisdiction of the boards to cases “arising under” remedy granting clauses in the contract. See Utah Mining and Constr. Co. v. United States, 384 U.S. 394 (1966).
6. The Contract Disputes Act (CDA) of 1978, 41 U.S.C. §§ 601-613. Congress replaced the previous disputes resolution system with a comprehensive statutory scheme. Congress intended that the CDA:
  - a. Help induce resolution of more disputes by negotiation prior to litigation;
  - b. Equalize the bargaining power of the parties when a dispute exists;
  - c. Provide alternate forums suitable to handle the different types of disputes; and
  - d. Insure fair and equitable treatment to contractors and Government agencies. S. REP. NO. 95-1118, at 1 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5235.
7. Federal Courts Improvement Act of 1982, Pub. L. No. 97-164, 96 Stat. 25. Congress overhauled the Court of Claims and created a new Article I court (i.e., the Claims Court) from the old Trial Division of the Court of Claims. Congress also merged the Court of Claims and the Court of Customs and Patent Appeals to create the Court of Appeals for the Federal Circuit (CAFC).<sup>2</sup>

---

<sup>2</sup> The Act revised the jurisdiction of the new courts substantially.

8. Federal Courts Administration Act of 1992, Pub. L. No. 102-572, 106 Stat. 3921. Congress changed the name of the Claims Court to the United States Court of Federal Claims (COFC), and expanded the jurisdiction of the court to include the adjudication of nonmonetary claims.
9. Federal Acquisition Streamlining Act (FASA) of 1994, Pub. L. No. 103-355, 108 Stat. 3243. Congress increased the monetary thresholds for requiring CDA certifications and requesting expedited and accelerated appeals.<sup>3</sup>

B. The Disputes Process.

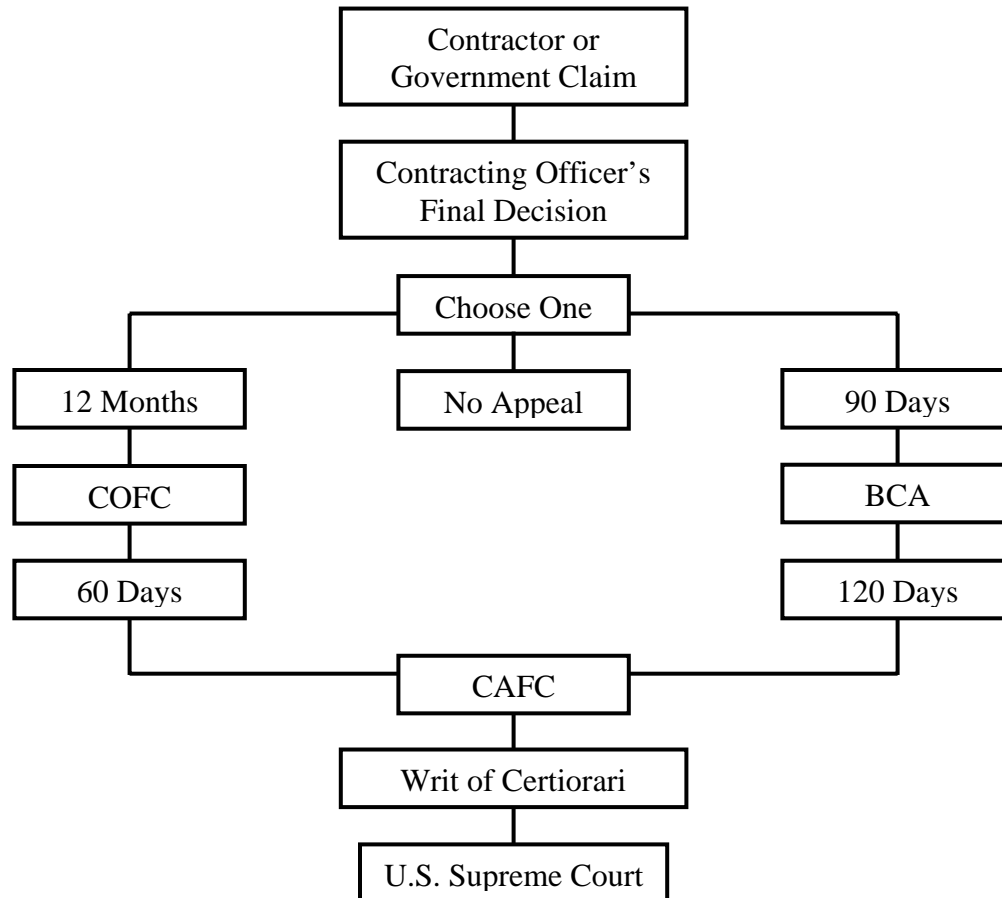
1. The CDA establishes procedures and requirements for asserting and resolving claims subject to the Act.
2. Distinguishing bid protests from disputes.
  - a. In bid protests, disappointed bidders or offerors seek relief from actions that occur before contract award. See generally FAR Subpart 33.1.
  - b. In contract disputes, contractors seek relief from actions and events that occur after contract award. See generally FAR Subpart 33.2.
  - c. The Boards of Contract Appeals lack jurisdiction over bid protest actions. See United States v. John C. Grimberg, Inc., 702 F.2d 1362 (Fed. Cir. 1983) (stating that “the [CDA] deals with contractors, not with disappointed bidders); Ammon Circuits Research, ASBCA No. 50885, 97-2 BCA ¶ 29,318 (dismissing an appeal based on the contracting officer’s written refusal to award the contractor a research contract); RC 27th Ave. Corp., ASBCA No. 49176, 97-1 BCA ¶ 28,658 (dismissing an appeal for lost profits arising from the contracting officer’s failure to award the contractor a grounds maintenance services contract).

---

<sup>3</sup> This Act represented Congress’s first major effort to reform the federal procurement process since it passed the CDA.

3. The disputes process flowchart.<sup>4</sup>

## The Disputes Process



---

<sup>4</sup> Note that for maritime contract actions, the CDA recognizes jurisdiction of district courts to hear appeals of ASBCA decisions, or to entertain suits filed following a contracting officer's final decision. See 41 U.S.C. § 603; See also *Marine Logistics, Inc. v. Secretary of the Navy*, 265 F.3d 1322 (Fed. Cir. 2001).

4. The Election Doctrine. The CDA provides alternative forums for challenging a contracting officer's final decision. Once a contractor files its appeal in a particular forum, this election is normally binding and the contractor can no longer pursue its claim in the other forum. The "election doctrine," however, does not apply if the forum originally selected lacked subject matter jurisdiction over the appeal. 41 U.S.C. §§ 606, 609(a)(1). See Bonneville Assocs. v. United States, 43 F.3d 649 (Fed. Cir. 1994) (dismissing the contractor's suit because the contractor originally elected to proceed before the GSBCA); see also Bonneville Assocs. v. General Servs. Admin., GSBCA No. 13134, 96-1 BCA ¶ 28,122 (refusing to reinstate the contractor's appeal), aff'd, Bonneville Assoc. v. United States, 165 F.3d 1360 (Fed. Cir. 1999).

### III. APPLICABILITY OF THE DISPUTES CLAUSE.

#### A. Appropriated Fund Contracts.

1. The CDA applies to most express and implied-in-fact<sup>5</sup> contracts.<sup>6</sup> 41 U.S.C. § 602; FAR 33.203.
2. The Federal Acquisition Regulation (FAR) implements the CDA by requiring the contracting officer to include a Disputes clause in solicitations and contracts.<sup>7</sup> FAR 33.215.
  - a. FAR 52.233-1, Disputes, requires the contractor to continue to perform pending resolution of disputes "arising under"<sup>8</sup> the contract. See Attachment A.

---

<sup>5</sup> An "implied-in-fact" contract is similar to an "express" contract. It requires: (1) "a meeting of the minds" between the parties; (2) consideration; (3) an absence of ambiguity surrounding the offer and the acceptance; and (4) an agency official with actual authority to bind the government. James L. Lewis v. United States, 70 F.3d 597 (Fed. Cir. 1995).

<sup>6</sup> The CDA normally applies to contracts for: (1) the procurement of property; (2) the procurement of services; (3) the procurement of construction, maintenance, and repair work; and (4) the disposal of personal property. 41 U.S.C. § 602. Cf. G.E. Boggs & Assocs., Inc., ASBCA Nos. 34841, 34842, 91-1 BCA ¶ 23,515 (holding that the CDA did not apply because the parties did not enter into a contract for the procurement of property, but retaining jurisdiction pursuant to the disputes clause in the contract).

<sup>7</sup> The CDA—and hence the Disputes clause—does not apply to: (1) tort claims that do not arise under or relate to an express or an implied-in-fact contract; (2) claims for penalties or forfeitures prescribed by statute or regulation that another federal agency is specifically authorized to administer, settle or determine; (3) claims involving fraud; and (4) bid protests. 41 U.S.C. §§ 602, 604, 605(a); FAR 33.203; FAR 33.209; FAR 33.210.

- b. FAR 52.233-1, Alternate I, Disputes, requires the contractor to continue to perform pending resolution of disputes “arising under or relating to”<sup>9</sup> the contract.<sup>10</sup> See Attachment A.

B. Nonappropriated Fund (NAF) Contracts.

1. Exchange Service contracts. The CDA applies to contracts with the Army and Air Force, Navy, Marine Corps, Coast Guard, and NASA Exchanges. See 41 U.S.C. § 602(a), 28 U.S.C. §§ 1346, 1491. The CDA does not apply to other nonappropriated fund contracts.<sup>11</sup> See e.g. Furash & Co. v. United States, 46 Fed. Cl. 518 (2000) (dismissing suit concerning contract with Federal Housing Finance Board).
2. In the past, the government often included a disputes clause in non-exchange NAF contracts, thereby giving a contractor the right to appeal a dispute to a BCA. See AR 215-4, Chapter 7, Section II; Charitable Bingo Assoc. Inc., ASBCA No. 53249, 01-2 BCA ¶ 31,478 (holding that the board had jurisdiction over a dispute with a NAF based on the inclusion of the disputes clause). Further, an agency directive granting NAF contractors a right of appeal has served as the basis for board jurisdiction, even when the contract contained no disputes clause. See DODD 5515.6; Recreational Enters., ASBCA No. 32176, 87-1 BCA ¶ 19,675 (board had jurisdiction over NAF contract dispute because DOD directives required contract clause granting a right of appeal).

---

<sup>8</sup> “Arising under the contract” is defined as falling within the scope of a contract clause and therefore providing a remedy for some event occurring during contract performance. RALPH C. NASH ET AL., THE GOVERNMENT CONTRACTS REFERENCE BOOK, at 8 (2d ed. 1998).

<sup>9</sup> “Relating to the contract” means having a connection to the contract. The term encompasses claims that cannot be resolved through a contract clause, such as for breach of contract or correction of mistakes. Prior to passage of the CDA, contractors pursued relief for mutual mistake (rescission or reformation) under the terms of Pub. L. No. 85-804 (see FAR 33.205; FAR Part 50, Extraordinary Contractual Actions). RALPH C. NASH ET AL., THE GOVERNMENT CONTRACTS REFERENCE BOOK, at 438 (2d ed. 1998).

<sup>10</sup> The Department of Defense (DOD) typically uses this clause for mission critical contracts, such as purchases of aircraft, naval vessels, and missile systems. DFARS 233.215.

<sup>11</sup> In addition, the CDA does not normally apply to: (1) Tennessee Valley Authority contracts; (2) contracts for the sale of real property; or (3) contracts with foreign governments or agencies. 41 U.S.C. § 602; FAR 33.203.

3. However, See Pacrim Pizza v. Secretary of the Navy, 304 F.3d 1291 (Fed. Cir. 2002) (CAFC refused to grant jurisdiction over non-exchange NAFI contract dispute; even though the contract included the standard disputes clause, the court held that only Congress can waive sovereign immunity, and the parties may not by contract bestow jurisdiction on a court). See also Core Concepts of Florida, Inc. v. United States, 327 F.3d 1331 (Fed. Cir. 2003) (CAFC upheld a COFC decision that it lacked jurisdiction over a Federal Prison Industry (FPI) contract under the Tucker Act because FPI was a self-sufficient NAFI).

#### IV. CONTRACTOR CLAIMS.

##### A. Proper Claimants.

1. Only the parties to the contract (i.e., the prime contractor and the government) may normally submit a claim. 41 U.S.C. § 605(a).
2. Subcontractors.
  - a. A subcontractor can't file a claim directly with the contracting officer. United States v. Johnson Controls, 713 F.2d 1541 (Fed. Cir. 1983) (dismissing subcontractor claim); see also Detroit Broach Cutting Tools, Inc., ASBCA No. 49277, 96-2 BCA ¶ 28,493 (holding that the subcontractor's direct communication with the government did not establish privity); Southwest Marine, Inc., ASBCA No. 49617, 96-2 BCA ¶ 28,347 (rejecting the subcontractor's assertion that the Suits in Admiralty Act gave it the right to appeal directly); cf. Department of the Army v. Blue Fox, 119 S. Ct. 687 (1999) (holding that a subcontractor may not sue the government directly by asserting an equitable lien on funds held by the government). But see Choe-Kelly, ASBCA No. 43481, 92-2 BCA ¶ 24,910 (holding that the board had jurisdiction to consider the subcontractor's unsponsored claim alleging an implied-in-fact contract).
  - b. A prime contractor, however, can sponsor claims (also called "pass-through claims") on behalf of its subcontractors. Erickson Air Crane Co. of Washington, Inc. v. United States, 731 F.2d 810 (Fed. Cir. 1984); McPherson Contractors, Inc., ASBCA No. 50830, 98-1 BCA ¶ 29,349 (appeal dismissed where prime stated it did not wish to pursue the appeal).

3. Sureties. Absent privity of contract, sureties may not file claims. Admiralty Constr., Inc. v. Dalton, 156 F.3d 1217 (Fed. Cir. 1998) (surety must finance contract completion or take over performance to invoke doctrine of equitable subrogation); William A. Ransom and Robert D. Nesen v. United States, 900 F.2d 242 (Fed. Cir. 1990) (discussing doctrine of equitable subrogation). However, see also Fireman's Fund Insurance Co. v. England, 313 F.3d 1344 (Fed Cir. 2002) (although the doctrine of equitable subrogation is recognized by the COFC under the Tucker Act, the CDA only covers "claims by a contractor against the government relating to a contract," thus a surety is not a "contractor" under the CDA).
  
4. Dissolved/Suspended Corporations. A corporate contractor must possess valid corporate status, as determined by applicable state law, to assert a CDA appeal. See Micro Tool Eng'g, Inc., ASBCA No. 31136, 86-1 BCA ¶ 18,680 (holding that a dissolved corporation could not sue under New York law). But cf. Fre'nce Mfg. Co., ASBCA No. 46233, 95-2 BCA ¶ 27,802 (allowing a "resurrected" contractor to prosecute the appeal). Allied Prod. Management, Inc., and Richard E. Rowan, J.V., DOT CAB No. 2466, 92-1 BCA ¶ 24,585 (allowing a contractor to appeal despite its suspended corporate status).. In determining what powers survive dissolution, courts and boards look to the laws of the state of incorporation. See AEI Pacific, Inc., ASBCA No. 53806, 05-1 BCA ¶ 32,859 (holding that a dissolved Alaska corporation could initiate proceedings before the ASBCA as part of its "winding up its affairs" as allowed by the Alaskan Statute concerning the dissolution Alaskan Corporations.)

#### B. Definition of a Claim.

1. Contract Disputes Act. The CDA does not define the term "claim." As a result, courts and boards look to the FAR for a definition. See Essex Electro Eng'rs, Inc. v. United States, 960 F.2d 1576 (Fed. Cir. 1992) (holding that the executive branch has authority to issue regulations implementing the CDA, to include defining the term "claim," and that the FAR definition is consistent with the CDA).
  
2. FAR. The FAR defines a "claim" as "a written demand or written assertion by one of the contracting parties seeking, as a matter of right, the payment of money in a sum certain, the adjustment or interpretation of contract terms, or other relief arising under or relating to a contract." FAR 33.201; FAR 52.233-1.

- a. Claims arising under or relating to the contract include those supported by remedy granting clauses, breach of contract claims, and mistakes alleged after award.
- b. A written demand (or written assertion) seeking the payment of money in excess of \$100,000 is not a valid CDA claim until the contractor properly certifies it. FAR 33.201.
- c. A request for an equitable adjustment (REA) is not a “routine request for payment” and satisfies the FAR definition of “claim.” Reflectone, Inc. v. Dalton, 60 F.3d 1572 (Fed. Cir. 1995).
- d. A voucher, invoice, or other routine request for payment that is not in dispute when submitted is not a valid CDA claim. FAR 33.201; 52.233-1. A contractor may convert such a submission into a valid CDA claim if:
  - (1) The contractor complies with the submission and certification requirements of the Disputes clause; and
  - (2) The contracting officer:
    - (a) Disputes the submission as to either liability or amount; or
    - (b) Fails to act in a reasonable time. FAR 33.201; FAR 52.233-1. See S-TRON, ASBCA No. 45890, 94-3 BCA ¶ 26,957 (contracting officer’s failure to respond for 6 months to contractor’s “relatively simple” engineering change proposal (ECP) and REA was unreasonable).

C. Elements of a Claim.



1. The demand or assertion must be in writing. 41 U.S.C. § 605(a); FAR 33.201. See Honig Indus. Diamond Wheel, Inc., ASBCA No. 46711, 94-2 BCA ¶ 26,955 (granting the government's motion to strike monetary claims that the contractor had not previously submitted to the contracting officer); Clearwater Constructors, Inc. v. United States, 56 Fed. Cl. 303 (2003) (a subcontractor's letter detailing its dissatisfaction with a contracting officer's contract interpretation, attached to a contractor's cover-letter requesting a formal review and decision, constituted a non-monetary claim under the CDA).
  
2. Seeking as a matter of right,<sup>12</sup> one of the following:
  - a. Payment of money in a sum certain;
  
  - b. Adjustment or interpretation of contract terms. TRW, Inc., ASBCA Nos. 51172 and 51530, 99-2 BCA ¶ 30,047 (seeking decision on allowability and allocability of certain costs). Compare William D. Euille & Assocs., Inc. v. General Services Administration, GSBGA No. 15,261, 2000 GSBGA LEXIS 105 (May 3, 2000) (dispute concerning directive to remove and replace building materials proper contract interpretation claim), with Rockhill Industries, Inc., ASBCA No. 51541, 00-1 BCA ¶ 30,693 (money claim "masquerading as claim for contract interpretation"); or
  
  - c. Other relief arising under or relating to the contract. See General Electric Co.; Bayport Constr. Co., ASBCA Nos. 36005, 38152, 39696, 91-2 BCA ¶ 23,958 (demand for contractor to replace or correct latent defects under Inspection clause).
    - (1) Reformation or Rescission. See McClure Electrical Constructors, Inc. v. United States, 132 F.3d 709 (Fed. Cir. 1997); LaBarge Products, Inc. v. West, 46 F.3d 1547 (Fed. Cir. 1995) (ASBCA had jurisdiction to entertain reformation claim).

---

<sup>12</sup> Some submissions, such as cost proposals for work the government later decides it would like performed, would not be considered submissions seeking payment "as a matter of right." Reflectone v. Dalton, 60 F.3d 1572, n.7 (Fed. Cir. 1995).

- (2) Specific performance is not an available remedy. Western Aviation Maintenance, Inc. v. General Services Administration, GSBCA No. 14165, 98-2 BCA ¶ 29,816.
3. Submitted to the contracting officer for a decision. 41 U.S.C. § 605(a).
- a. The Federal Circuit has interpreted the CDA's submission language as requiring the contractor to "commit" the claim to the contracting officer and "yield" to his authority to make a final decision. Dawco Constr., Inc. v. United States, 930 F.2d 872 (Fed. Cir. 1991).
- b. The claim need not be sent only to the contracting officer, or directly to the contracting officer. If the contractor submits the claim to its primary government contact with a request for a contracting officer's final decision, and the primary contact delivers the claim to the contracting officer, the submission requirement can be met. Neal & Co. v. United States, 945 F.2d 385 (Fed. Cir. 1991) (claim requesting contracting officer's decision addressed to Resident Officer in Charge of Construction). See also D.L. Braughler Co., Inc. v. West, 127 F.3d 1476 (Fed. Cir. 1997) (submission to resident engineer not seeking contracting officer decision not a claim); J&E Salvage Co., 37 Fed. Cl. 256 (1997) (letter submitted to the Department of Justice rather than the Defense Reutilization and Marketing Office was not a claim).
- c. Only receipt by the contracting officer triggers the time limits and interest provisions set forth in the CDA. See 41 U.S.C. § 605(c)(1), § 611.
- d. A claim should implicitly or explicitly request a contracting officer's final decision. See Ellett Constr. Co., Inc. v. United States, 93 F.3d 1537 (Fed. Cir. 1996) (holding that submission to the contracting officer is required, but the request for a final decision may be implied); Heyl & Patterson, Inc. v. O'Keefe, 986 F.2d 480, 483 (Fed. Cir. 1993) (stating that "a request for a final decision can be implied from the context of the submission"); Transamerica Ins. Corp. v. United States, 973 F.2d 1572, 1576 (Fed. Cir. 1992) (stating that no "magic words" are required "as long as what the contractor desires by its submissions is a final decision").

- e. A contracting officer can't issue a valid final decision if the contractor explicitly states that it is not seeking a final decision. Fisherman's Boat Shop, Inc. ASBCA No. 50324, 97-2 BCA ¶ 29,257 (holding that the contracting officer's final decision was a nullity because the contractor did not intend for its letter submission to be treated as a claim).
4. Certification. A contractor must certify any claim that exceeds \$100,000. 41 U.S.C. § 605(c)(1); FAR 33.207. CDA certification serves to create the deterrent of potential liability for fraud and thereby discourage contractors from submitting unwarranted or inflated claims. See Fischbach & Moore Int'l Corp. v. Christopher, 987 F.2d 759 (Fed. Cir. 1993).
    - a. Determining the Claim Amount.
      - (1) A contractor must consider the aggregate effect of increased and decreased costs to determine whether the claim exceeds the dollar threshold for certification.<sup>13</sup> FAR 33.207(d).
      - (2) Claims that are based on a "common or related set of operative facts" constitute one claim. Placeway Constr. Corp., 920 F.2d 903 (Fed. Cir. 1990).
      - (3) A contractor may not split a single claim that exceeds \$100,000 into multiple claims to avoid the certification requirement. See, e.g., Walsky Constr. Co v. United States, 3 Ct. Cl. 615 (1983); Warchol Constr. Co. v. United States, 2 Ct. Cl. 384 (1983); D&K Painting Co., Inc., DOTCAB No. 4014, 98-2 BCA ¶ 30,064; Columbia Constr. Co., ASBCA No. 48536, 96-1 BCA ¶ 27,970; Jay Dee Militarywear, Inc., ASBCA No. 46539, 94-2 BCA ¶ 26,720.
      - (4) Separate claims that total less than \$100,000 each require no certification, even if their combined total exceeds \$100,000. See Phillips Constr. Co., ASBCA No. 27055, 83-2 BCA ¶ 16,618; B. D. Click Co., ASBCA No. 25609, 81-2 BCA ¶ 15,394.

---

<sup>13</sup> The contractor need not include the amount of any government claims in its calculations. J. Slotnik Co., VABCA No. 3468, 92-1 BCA ¶ 24,645.

- (5) The contracting officer cannot consolidate separate claims to create a single claim that exceeds \$100,000. See B. D. Click Co., Inc., ASBCA No. 25609, 81-2 BCA ¶ 15,395. Courts and boards, however, can consolidate separate claims for hearing to promote judicial economy.
- (6) A contractor need not certify a claim that grows to exceed \$100,000 after the contractor submits it to the contracting officer if:
  - (a) The increase was based on information that was not reasonably available at the time of the initial submission; or
  - (b) The claim grew as the result of a regularly accruing charge and the passage of time. See Tecom, Inc. v. United States, 732 F.2d 935 (Fed. Cir. 1984) (concluding that the contractor need not certify a \$11,000 claim that grew to \$72,000 after the government exercised certain options); AAI Corp. v. United States, 22 Cl. Ct. 541 (1991) (refusing to dismiss a claim that was \$0 when submitted, but increased to \$500,000 by the time the suit came before the court); Mulunesh Berhe, ASBCA No. 49681, 96-2 BCA ¶ 28,339.

b. Certification Language Requirement. FAR 33.207(c). When required to do so, a contractor must certify that:

- (1) The claim is made in good faith;
- (2) The supporting data are accurate and complete to the best of the contractor's knowledge and belief;
- (3) The amount requested accurately reflects the contract adjustment for which the contractor believes the government is liable; and

(4) The person submitting the claim is duly authorized to certify the claim on the contractor's behalf.<sup>14</sup>

c. Proper Certifying Official. A contractor may certify its claim through "any person duly authorized to bind the contractor with respect to the claim." 41 U.S.C. § 605(c)(7); FAR 33.207(e). See Metric Constructors, Inc., ASBCA No. 50843, 98-2 BCA ¶ 30,088 (concluding that senior project manager was proper certifying official).

d. No claim vs. Defective Certification. Tribunals treat differently those cases where an attempted certification is "substantially" compliant from those where the certification is either entirely absent or the language is intentionally or negligently defective.

(1) No claim.

(a) Absence of Certification. No valid claim exists. See FAR 33.201 ("Failure to certify shall not be deemed to be a defective certification."); Hamza v. United States, 31 Fed. Cl. 315 (1994) (complete lack of an attempted certification); Eurostyle Inc., ASBCA No. 45934, 94-1 BCA ¶ 26,458 ("complete absence of any certification is not a mere defect which may be corrected").

---

<sup>14</sup> Absent extraordinary circumstances, courts and boards will not question the accuracy of the statements in a contractor's certification. D.E.W., Inc., ASBCA No. 37332, 94-3 BCA ¶ 27,004. A prime contractor need not agree with all aspects or elements of a subcontractor's claim. In addition, a prime contractor need not be certain of the government's liability, or the amount recoverable. The prime contractor need only believe that the subcontractor has good grounds to support its claim. See Oconto Elec., Inc., ASBCA No. 45856, 94-3 BCA ¶ 26,958 (holding that the prime contractor properly certified its subcontractor's claim, even though the official certifying the claim lacked personal knowledge of the amount claimed); see also Arnold M. Diamond, Inc. v. Dalton, 25 F.3d 1006 (Fed. Cir. 1994) (upholding the contractor's submission of a subcontractor's claim pursuant to a court order).

- (b) Certifications made with intentional, reckless, or negligent disregard of CDA certification requirements are not correctable. See Walashek Industrial & Marine, Inc., ASBCA No. 52166, 00-1 BCA ¶ 30,728 (two prongs of certificate omitted or not fairly compliant); Keydata Sys, Inc. v. Department of the Treasury, GSBCA No. 14281-TD, 97-2 BCA ¶ 29,330 (denying the contractor's petition for a final decision because it failed to correct substantial certification defects).
- (2) Claim with "Defective" Certification. 41 U.S.C. § 605(c)(6). FAR 33.201 defines a defective certification as one which alters or otherwise deviates from the language in 33.207(c) or which is not executed by a person duly authorized to bind the contractor.
- (a) Exact recitation of the language of CDA section 605(c) is not required—"substantial compliance" suffices. See Fischbach & Moore Int'l Corp. v. Christopher, 987 F.2d 759 (Fed. Cir. 1993) (substituting the word "understanding" for "knowledge" did not render certificate defective).
  - (b) Technical defects are correctable. Examples include missing certifications when two or more claims are deemed to be a larger claim requiring certification, and certification by the wrong representative of the contractor. See H.R. Rep. No. 102-1006, 102d Cong., 2d Sess. 28, reprinted in 1992 U.S.C.C.A. at 3921, 3937.

- (c) Certifications used for other purposes may be acceptable even though they do not include the language required by the CDA. See James M. Ellett Const. Co., Inc. v. United States, 93 F.3d 1537 (Fed. Cir. 1996) (SF 1436 termination proposal not substantially deficient as a CDA certificate); Metric Constructors, Inc., ASBCA No. 50843, 98-2 BCA ¶ 30,088. Compare SAE/Americon - Mid-Atlantic, Inc., GSBGA No. 12294, 94-2 BCA ¶ 26,890 (holding that the contractor's "certificate of current cost or pricing data" on SF 1411 was susceptible of correction, even though it did not include the first and third statements required for a proper CDA certification), with Scan-Tech Security, L.P. v. United States, 46 Fed. Cl. 326 (2000) (suit dismissed after court equated use of SF 1411 with no certification).
- (d) The CO need not render a final decision if he notifies the contractor in writing of the defect within 60 days after receipt of the claim. 41 U.S.C. § 605 (c)(6).
- (e) Interest on a claim with a defective certification shall be paid from the date the contracting officer initially received the claim. FAR 33.208(c).
- (f) A defect will not deprive a court or board of jurisdiction, but it must be corrected before entry of a court's final judgment or a board's decision. 41 U.S.C. § 605 (c)(6).

D. Demand for a Sum Certain.

1. Where the essence of a dispute is the increased cost of performance, the contractor must demand a sum certain as a matter of right. Compare Essex Electro Eng'rs, Inc. v. United States, 22 Cl. Ct. 757, aff'd, 960 F.2d 1576 (Fed. Cir. 1992) (holding that a cost proposal for possible future work did not seek a sum certain as a matter of right); with J.S. Alberici Constr. Co., ENG BCA No. 6179, 97-1 BCA ¶ 28,639, recon. denied, ENG BCA No. 6179-R, 97-1 BCA ¶ 28,919 (holding that a request for costs associated with ongoing work, but not yet incurred, was a sum certain); McDonnell Douglas Corp., ASBCA No. 46582, 96-2 BCA ¶ 28,377 (holding that a sum certain can exist even if the contractor has not yet incurred any costs); Fairchild Indus., ASBCA No. 46197, 95-1 BCA ¶ 27,594 (holding that a request based on estimated future costs was a sum certain).
  
2. A claim states a sum certain if:
  - a. The government can determine the amount of the claim using a simple mathematical formula. Metric Constr. Co. v. United States, 1 Cl. Ct. 383 (1983); Mulunesh Berhe, ASBCA No. 49681, 96-2 BCA ¶ 28,339 (simple multiplication of requested monthly rate for lease); Jepco Petroleum, ASBCA No. 40480, 91-2 BCA ¶ 24,038 (claim requesting additional \$3 per linear foot of excavation, when multiplied by total of 10,000 feet, produced sum certain).
  
  - b. Enlarged claim doctrine. Under this doctrine, a BCA or the COFC may exercise jurisdiction over a dispute that involves a sum in excess of that presented to the contracting officer for a final decision if:
    - (1) The increase in the amount of the claim is based on the same set of operative facts previously presented to the contracting officer; and
  
    - (2) The contractor neither knew nor reasonably should have known, at the time when the claim was presented to the contracting officer, of the factors justifying an increase in the amount of the claim. Johnson Controls World Services, Inc. v. United States, 43 Fed. Cl. 589 (1999). See also Stencel Aero Engineering Corp., ASBCA No. 28654, 84-1 BCA ¶ 16,951 (finding essential character or elements of the certified claim had not been changed).



- E. Supporting Data. Invoices, detailed cost breakdowns, and other supporting financial documentation need not accompany a CDA claim as a jurisdictional prerequisite. H.L. Smith v. Dalton, 49 F.3d 1563 (Fed. Cir. 1995) (contractor's failure to provide CO with additional information "simply delayed action on its claims"); John T. Jones Constr. Co., ASBCA No. 48303, 96-1 BCA ¶ 27,997 (stating that the contracting officer's desire for more information did not invalidate the contractor's claim submission).
- F. Settlement.
1. Agencies should attempt to resolve claims by mutual agreement, if possible. FAR 33.204; FAR 33.210. See Pathman Constr. Co., Inc. v. United States, 817 F.2d 1573 (Fed. Cir. 1987) (stating that a "major purpose" of the CDA is to "induce resolution of contract disputes with the government by negotiation rather than litigation").
  2. Only contracting officers or their authorized representatives may normally settle contract claims. See FAR 33.210; see also J.H. Strain & Sons, Inc., ASBCA No. 34432, 88-3 BCA ¶ 20,909 (refusing to enforce a settlement agreement that the agency's attorney entered into without authority). The Department of Justice (DOJ), however, has plenary authority to settle cases pending before the COFC. See Executive Business Media v. Department of Defense, 3 F.3d 759 (4th Cir. 1993).
  3. Contracting officers are authorized, within the limits of their warrants, to decide or resolve all claims arising under or relating to the contract except for:
    - a. A claim or dispute for penalties or forfeitures prescribed by statute or regulation that another Federal agency is specifically authorized to administer, settle, or determine; or
    - b. The settlement, compromise, payment or adjustment of any claim involving fraud.<sup>15</sup> FAR 33.210.

G. Interest.

---

<sup>15</sup> When a claim is suspected to be fraudulent, the contracting officer shall refer the matter to the agency official responsible for investigating fraud. FAR 33.209. To justify a stay in a Board proceeding, the movant has the burden to show there are substantially similar issues, facts and witnesses in civil and criminal proceedings, and there is a need to protect the criminal litigation which overrides any injury to the parties by staying the civil litigation. Afro-Lecon, Inc. v. United States, 820 F.2d 1198 (Fed. Cir. 1987); T. Iida Contracting, Ltd., ASBCA No. 51865, 00-1 BCA ¶ 30,626.

1. Interest on CDA claims is calculated every six months based on a rate established by the Secretary of the Treasury pursuant to Pub. L. No. 92-41, 85 Stat. 97. 41 U.S.C. § 611; FAR 33.208.
2. Established interest rates can be found at [www.publicdebt.treas.gov](http://www.publicdebt.treas.gov).
3. Interest may begin to accrue on costs before the contractor incurs them. See Servidone Constr. Corp. v. United States, 931 F.2d 860 (Fed. Cir. 1991) (stating that 41 U.S.C. § 611 “sets a single, red-letter date for the interest of all amounts found due by a court without regard to when the contractor incurred the costs”); see also Caldera v. J.S. Alberici Constr. Co., 153 F.3d 1381 (Fed Cir. 1998) (holding that 41 U.S.C. § 611 “trumps” conflicting regulations that prohibit claims for future costs).

H. Termination for Convenience (T4C) Settlement Proposals. FAR 49.206.

1. A contractor may submit a settlement proposal for costs associated with the termination of a contract for the convenience of the government. FAR 49.206-1; FAR 49.602-1. See Standard Form (SF) 1435, Settlement Proposal (Inventory Basis); SF 1436, Settlement Proposal (Total Cost Basis); SF 1437, Settlement Proposal for Cost-Reimbursement Type Contracts; SF 1438, Settlement Proposal (Short Form).
2. Courts and boards consider T4C settlement proposals to be “nonroutine” submissions under the CDA. See Ellett, 93 F.3d at 1542 (stating that “it is difficult to conceive of a less routine demand for payment than one which is submitted when the government terminates a contract for its convenience”).

- a. Courts and boards, however, do not consider T4C settlement proposals to be CDA claims when submitted because contractors normally do not submit them for a contracting officer's final decision—they submit them to facilitate negotiations. See Ellett Constr. Co., Inc. v. United States, 93 F.3d 1537 (Fed. Cir. 1996) (T4C settlement proposal was not a claim because the contractor did not submit it to the contracting officer for a final decision); see also Walsky Constr. Co. v. United States, 173 F.3d 1312 (Fed. Cir. 1999) (T4C settlement proposal was not a claim because it had not yet been the subject of negotiations with the government); cf. Medina Constr., Ltd. v. United States, 43 Fed. Cl. 537, 551 (1999) (parties may reach an impasse without entering into negotiations if allegations of fraud prevent the contracting officer from entering into negotiations).
  - b. A T4C settlement proposal may “ripen” into a CDA claim once settlement negotiations reach an impasse. See Ellett, 93 F.3d at 1544 (holding that the contractor's request for a final decision following ten months of “fruitless negotiations” converted its T4C settlement proposal into a claim); Metric Constructors, Inc., ASBCA No. 50843, 98-2 BCA ¶ 30,088 (holding that a contractor's T4C settlement proposal ripened into a claim when the contracting officer issued a unilateral contract modification following the parties' unsuccessful negotiations); cf. FAR 49.109-7(f) (stating that a contractor may appeal a “settlement by determination” under the Disputes clause unless the contractor failed to submit its T4C settlement proposal in a timely manner).
3. Certification. If a CDA certification is required, the contractor may rely on the standard certification in whichever SF the FAR requires it to submit. See Ellett, 93 F.3d at 1545 (rejecting the government's argument that proper certification of a T4C settlement proposal is a jurisdictional prerequisite); see also Metric Constructors, Inc., supra. (concluding that the contractor could “correct” the SF 1436 certification to comply with the CDA certification requirements).

4. Interest. The FAR precludes the government from paying interest under a settlement agreement or determination; however, the FAR permits the government to pay interest on a contractor's successful appeal. FAR 49.112-2(d). Therefore, the government cannot pay interest on a T4C settlement proposal unless it "ripens" into a CDA claim and the contractor successfully appeals to the ASBCA or the COFC. See Ellett, 93 F.3d at 1545 (recognizing the fact that T4C settlement proposals are treated disparately for interest purposes); see also Central Envtl. Inc., ASBCA 51086, 98-2 BCA ¶ 29,912 (concluding that interest did not begin to run until after the parties' reached an impasse and the contractor requested a contracting officer's final decision).

#### I. Statute of Limitations.

1. In 1987, the Federal Circuit concluded that the six-year statute of limitations in the Tucker Act does not apply to CDA appeals. Pathman Constr. Co. v. United States, 817 F.2d 1573 (Fed. Cir. 1987).
2. In 1994, Congress revised the CDA to impose a six-year statute of limitations. Federal Acquisition Streamlining Act of 1994, Pub. L. No. 103-355, 108 Stat. 3243 (codified at 40 U.S.C. § 605). See FAR 33.206; see also Motorola, Inc. v. West, 125 F.3d 1470 (Fed. Cir. 1997).
  - a. For contracts awarded on or after 1 October 1995, a contractor must submit its claim within six years of the date the claim accrues.
  - b. This statute of limitations provision does not apply to government claims based on contractor claims involving fraud.

### V. GOVERNMENT CLAIMS.

#### A. Requirement for Final Decision. 41 U.S.C. § 605(a); FAR 52.233-1(d)(1).

1. The government may assert a claim against a contractor; however, the claim must be the subject of a contracting officer's final decision.
2. Some government actions are immediately appealable.

- a. Termination for Default. A contracting officer's decision to terminate a contract for default is an immediately appealable government claim. Independent Mfg. & Serv. Cos. of Am., Inc., ASBCA No. 47636, 94-3 BCA ¶ 27,223. See Malone v. United States, 849 F.2d 1441, 1443 (Fed. Cir. 1988); cf. Educators Assoc., Inc. v. United States, 41 Fed. Cl. 811 (1998) (dismissing the contractor's suit as untimely because the contractor failed to appeal within 12 months of the date it received the final termination decision).
- b. Withholding Monies. A contracting officer's decision to withhold monies otherwise due the contractor is an immediately appealable government claim. Placeway Constr. Corp. United States, 920 F.2d 903, 906 (Fed. Cir. 1990); Sprint Communications Co., L.P. v. General Servs. Admin., GSBCA No. 14263, 97-2 BCA ¶ 29,249.
- c. Cost Accounting Standards (CAS) Determination. A contracting officer's decision regarding the allowability of costs under the CAS is often an immediately appealable government claim. See Newport News Shipbuilding and Dry Dock Co. v. United States, 44 Fed. Cl. 613 (1999) (government's demand that the contractor change its accounting for all of its CAS-covered contracts was an appealable final decision); Litton Sys., Inc., ASBCA No. 45400, 94-2 BCA ¶ 26,895 (holding that the government's determination was an appealable government claim because the government was "seeking, as a matter of right, the adjustment or interpretation of contract terms"); cf. Aydin Corp., ASBCA No. 50301, 97-2 BCA ¶ 29,259 (holding that the contracting officer's failure to present a claim arising under CAS was a nonjurisdictional error).
- d. Miscellaneous Demands. See Bean Horizon-Weeks (JV), ENG BCA No. 6398, 99-1 BCA ¶ 30,134 (holding that a post-appeal letter demanding repayment for improper work was an appealable final decision); Outdoor Venture Corp., ASBCA No. 49756, 96-2 BCA ¶ 28,490 (holding that the government's demand for warranty work was a claim that the contractor could immediately appeal); Sprint Communications Co. v. General Servs. Admin., GSBCA No. 13182, 96-1 BCA ¶ 28,068. But see Boeing Co., 25 Cl. Ct. 441 (1992) (holding that a post-termination letter demanding the return of unliquidated progress payments was not appealable); Iowa-Illinois Cleaning Co. v. General Servs. Admin., GSBCA No. 12595, 95-2 BCA ¶ 27,628 (holding that government deductions for deficient performance are not appealable absent a contracting officer's final decision).

3. As a general rule, the government may not assert a counterclaim that has not been the subject of a contracting officer's final decision.
- B. **Contractor Notice.** Assertion of a government claim is usually a two-step process. A demand letter gives the contractor notice of the potential claim and an opportunity to respond. If warranted, the final decision follows. See FAR 33.211(a) ("When a claim by or against a contractor cannot be satisfied or settled by mutual agreement and a decision on the claim is necessary"); Instruments & Controls Serv. Co., ASBCA No. 38332, 89-3 BCA ¶ 22,237 (dismissing appeal because final decision not preceded by demand); see also Bean Horizon-Weeks (JV), ENG BCA No. 6398, 99-1 BCA ¶ 30,134; B.L.I. Constr. Co., ASBCA No. 40857, 92-2 BCA ¶ 24,963 (stating that "[w]hen the Government is considering action, the contractor should be given an opportunity to state its position, express its views, or explain, argue against, or contest the proposed action").
  - C. **Certification.** Neither party is required to certify a government claim. 41 U.S.C. §§ 605(a); 605(c)(1). See Placeway Constr. Corp., 920 F.2d at 906; Charles W. Ware, GSBCA No. 10126, 90-2 BCA ¶ 22,871. A contractor, however, must certify its request for interest on monies deducted or withheld by the government. General Motors Corp., ASBCA No. 35634, 92-3 BCA ¶ 25,149.
  - D. **Interest.** Interest on a government claim begins to run when the contractor receives the government's initial written demand for payment. FAR 52.232-17.
  - E. **Finality.** Once the contracting officer's decision becomes final (i.e., once the appeal period has passed), the contractor cannot challenge the merits of that decision judicially. 41 U.S.C. § 605(a). See Seaboard Lumber Co. v. United States, 903 F.2d 1560, 1562 (Fed. Cir. 1990); L.A. Constr., Inc., 95-1 BCA ¶ 27,291 (holding that the contractor's failure to appeal the final decision in a timely manner deprived the board of jurisdiction, even though both parties testified on the merits during the hearing).

## **VI. FINAL DECISIONS.**

- A. **General.** The contracting officer must issue a written final decision on all claims. 51 U.S.C. § 605(a); FAR 33.206; FAR 33.211(a). See Tyger Constr. Co., ASBCA No. 36100, 88-3 BCA ¶ 21,149. But cf. McDonnell Douglas Corp., ASBCA No. 44637, 93-2 BCA ¶ 25,700 (dismissing the contractor's appeal from a government claim for noncompliance with CAS because the procuring contracting officer issued the final decision instead of the cognizant administrative contracting officer as required by the FAR and DFARS).

- B. Time Limits. A contracting officer must issue a final decision on a contractor's claim within certain statutory time limits. 41 U.S.C. § 605(c); FAR 33.211.
1. Claims of \$100,000 or less. The contracting officer must issue a final decision within 60 days.
  2. Certified Claims Exceeding \$100,000. The contracting officer must take one of the following actions within 60 days:
    - a. Issue a final decision; or
    - b. Notify the contractor of a firm date by which the contracting officer will issue a final decision.<sup>16</sup> See Boeing Co. v. United States, 26 Cl. Ct. 257 (1992); Aerojet Gen. Corp., ASBCA No. 48136, 95-1 BCA ¶ 27,470 (concluding that the contracting officer failed to provide a firm date where the contracting officer made the timely issuance of a final decision contingent on the contractor's cooperation in providing additional information); Inter-Con Security Sys., Inc., ASBCA No. 45749, 93-3 BCA ¶ 26,062 (concluding that the contracting officer failed to provide a firm date where the contracting officer merely promised to render a final decision within 60 days of receiving the audit).
  3. Uncertified and Defectively Certified Claims Exceeding \$100,000.
    - a. The contracting officer has no obligation to issue a final decision on a claim that exceeds \$100,000 if the claim is:
      - (1) Uncertified; or
      - (2) Defectively certified.

---

<sup>16</sup> The contracting officer must issue the final decision within a reasonable period. What constitutes a "reasonable" period depends on the size and complexity of the claim, the adequacy of the contractor's supporting data, and other relevant factors. 41 U.S.C. § 605c(3); FAR 33.211(d). See Defense Sys. Co., ASBCA No. 50534, 97-2 BCA ¶ 28,981 (holding that nine months to review a \$72 million claim was reasonable).

- b. If the claim is defectively certified, the contracting officer must notify the contractor, in writing, within 60 days of the date the contracting officer received the claim of the reason(s) why any attempted certification was defective.

4. Failure to Issue a Final Decision.

- a. If the contracting officer fails to issue a final decision within a reasonable period of time, the contractor can:
  - (1) Request the tribunal concerned to direct the contracting officer to issue a final decision. 41 U.S.C. § 605(c)(4); FAR 33.211(f). See American Industries, ASBCA No. 26930-15, 82-1 BCA ¶ 15,753.
  - (2) Treat the contracting officer's failure to issue a final decision as an appealable final decision (i.e., a "deemed denial"). 41 U.S.C. § 605(c)(5); FAR 33.211(g). See Aerojet Gen. Corp., ASBCA No. 48136, 95-1 BCA ¶ 27,470.
- b. A BCA, however, cannot direct the contracting officer to issue a more detailed final decision than the contracting officer has already issued. A.D. Roe Co., ASBCA No. 26078, 81-2 BCA ¶ 15,231.

C. Format. 41 U.S.C. § 605(a); FAR 33.211(a)(4).

- 1. The final decision must be written. Tyger Constr. Co., ASBCA No. 36100, 88-3 BCA ¶ 21,149.
- 2. In addition, the final decision must:
  - a. Describe the claim or dispute;
  - b. Refer to the pertinent or disputed contract terms;
  - c. State the disputed and undisputed facts;



- d. State the decision and explain the contracting officer's rationale;
- e. Advise the contractor of its appeal rights; and
- f. Demand the repayment of any indebtedness to the government.

3. Rights Advisement.

- a. FAR 33.211(a)(4)(v) specifies that the final decision should include a paragraph substantially as follows:

This is a final decision of the Contracting Officer. You may appeal this decision to the agency board of contract appeals. If you decide to appeal, you must, within 90 days from the date you receive this decision, mail or otherwise furnish written notice to the agency board of contract appeals and provide a copy to the Contracting Officer from whose decision the appeal is taken. The notice shall indicate that an appeal is intended, reference this decision, and identify the contract by number. With regard to appeals to the agency board of contract appeals, you may, solely at your election, proceed under the board's small claim procedure for claims of \$50,000 or less or its accelerated procedure for claims of \$100,000 or less. Instead of appealing to the agency board of contract appeals, you may bring an action directly in the United States Court of Federal Claims (except as provided in the Contract Disputes Act of 1978, 41 U.S.C. 603, regarding Maritime Contracts) within 12 months of the date you receive this decision.

- b. Failure to properly advise the contractor of its appeal rights may prevent the "appeals clock" from starting. If the contracting officer's rights advisory is deficient, the contractor must demonstrate that, but for its detrimental reliance upon the faulty advice, its appeal would have been timely. Decker & Co. v. West, 76 F.3d 1573 (Fed. Cir. 1996).

- 4. Specific findings of fact are not required and, if made, are not binding on the government in any subsequent proceedings. See Wilner v. United States, 24 F.3d 1397 (Fed. Cir. 1994) (concluding that admissions favorable to the contractor do not constitute evidence of government liability).

D. Delivery. 41 U.S.C. § 605(a); FAR 33.211(b).

1. The contracting officer must mail (or otherwise furnish) a copy of the final decision to the contractor. See Images II, Inc., ASBCA No. 47943, 94-3 BCA ¶ 27,277 (holding that receipt by the contractor's employee constituted proper notice).
2. The contracting officer should use certified mail, return receipt requested; however, hand delivery and facsimile (FAX) transmission are also acceptable means of delivery.
3. The contracting officer should preserve all evidence of the date the contractor received the contracting officer's final decision. See Omni Abstract, Inc., ENG BCA No. 6254, 96-2 BCA ¶ 28,367 (relying on a government attorney's affidavit to determine when the 90-day appeals period started).
  - a. When hand delivering the final decision, the contracting officer should require the contractor to sign for the document.
  - b. When using a FAX transmission, the contracting officer should confirm receipt and memorialize the confirmation in a written memorandum. See Mid-Eastern Indus., Inc., ASBCA No. 51287, 98-2 BCA ¶ 29,907 (concluding that the government established a prima facie case by presenting evidence to show that it successfully transmitted the final decision to the contractor's FAX number); see also Public Service Cellular, Inc., ASBCA No. 52489, 00-1 BCA ¶ 30,832 (transmission report not sufficient evidence of receipt).

E. Independent Act of a Contracting Officer.

1. The final decision must be the contracting officer's personal, independent act. Compare PLB Grain Storage Corp. v. Glickman, 113 F.3d 1257 (Fed. Cir. 1997) (unpub.) (holding that a termination was proper even though a committee of officials directed it); with Climatic Rainwear Co. v. United States, 88 F. Supp. 415 (Ct. Cl. 1950) (holding that a termination was improper because the contracting officer's attorney prepared the termination findings without the contracting officer's participation).

2. The contracting officer should seek assistance from engineers, attorneys, auditors, and other advisors. See FAR 1.602-2 (requiring the contracting officer to request and consider the advice of “specialists,” as appropriate); FAR 33.211(a)(2) (requiring the contracting officer to seek assistance from “legal and other advisors”); see also Pacific Architects & Eng’rs, Inc. v. United States, 203 Ct. Cl. 499, 517 (1974) (opining that it is unreasonable to preclude the contracting officer from seeking legal advice); Prism Constr. Co., ASBCA No. 44682, 97-1 BCA ¶ 28,909 (indicating that the contracting officer is not required to independently investigate the facts of a claim before issuing final decision); Environmental Devices, Inc., ASBCA No. 37430, 93-3 BCA ¶ 26,138 (approving the contracting officer’s communications with the user agency prior to terminating the contract for default); cf. AR 27-1, para. 15-5a (noting the “particular importance” of the contracts attorney’s role in advising the contracting officer on the drafting of a final decision).

F. Finality. 41 U.S.C. § 605(b).

1. A final decision is binding and conclusive unless timely appealed.
2. Reconsideration.
  - a. A contracting officer may reconsider, withdraw, or rescind a final decision before the expiration of the appeals period. General Dynamics Corp., ASBCA No. 39866, 91-2 BCA ¶ 24,017. Cf. Daniels & Shanklin Constr. Co., ASBCA No. 37102, 89-3 BCA ¶ 22,060 (rejecting the contractor’s assertion that the contracting officer could not withdraw a final decision granting its claim, and indicating that the contracting officer has an obligation to do so if the final decision is erroneous).
  - b. The contracting officer’s rescission of a final decision, however, will not necessarily deprive a BCA of jurisdiction because jurisdiction vests as soon as the contractor files its appeal. See Security Servs., Inc., GSBCA No. 11052, 92-1 BCA ¶ 24,704; cf. McDonnell Douglas Astronautics Co., ASBCA No. 36770, 89-3 BCA ¶ 22,253 (indicating that the board would sustain a contractor’s appeal if the contracting officer withdrew the final decision after the contractor filed its appeal).

- c. A contracting officer may vacate his or her final decision unintentionally by agreeing to meet with the contractor to discuss the matters in dispute. See Sach Sinha and Assocs., ASBCA No. 46916, 95-1 BCA ¶ 27,499 (finding that the contracting officer “reconsidered” her final decision after she met with the contractor as a matter of “business courtesy” and requested the contractor to submit its proposed settlement alternatives in writing); Royal Int’l Builders Co., ASBCA No. 42637, 92-1 BCA ¶ 24,684 (holding that the contracting officer “destroyed the finality of his initial decision” by agreeing to meet with the contractor, even though the meeting was cancelled and the contracting officer subsequently sent the contractor a letter stating his intent to stand by his original decision).
  - d. To restart the appeal period after reconsidering a final decision, the contracting officer must issue a new final decision. Information Sys. & Networks Corp. v. United States, 17 Cl. Ct. 527 (1989); Sach Sinha and Assocs., ASBCA No. 46916, 95-1 BCA ¶ 27,499; Birken Mfg. Co., ASBCA No. 36587, 89-2 BCA ¶ 21,581.
3. The Fulford Doctrine. A contractor may dispute an underlying default termination as part of a timely appeal from a government demand for excess procurement costs, even though the contractor failed to appeal the underlying default termination in a timely manner. Fulford Mfg. Co., ASBCA No. 2143, 6 CCF ¶ 61,815 (May 20, 1955); Deep Joint Venture, GSBICA No. 14511, 02-2 BCA ¶ 31,914 (GSBICA confirms validity of the Fulford doctrine for post-CDA terminations).

## **VII. APPEALS TO THE ARMED SERVICES BOARD OF CONTRACT APPEALS (ASBCA).**

- A. The Right to Appeal. 41 U.S.C. § 606. A contractor may appeal a contracting officer’s final decision to an agency BCA.
- B. The Armed Services Board of Contract Appeals (ASBCA).
  - 1. The ASBCA consists of 25-30 administrative judges who dispose of approximately 800-900 appeals per year.

2. ASBCA judges specialize in contract disputes and come from both the government and private sectors. Each judge has at least five years of experience working in the field of government contract law.
  3. The Rules of the Armed Services Board of Contract Appeals appear in Appendix A of the DFARS.
- C. Jurisdiction. 41 U.S.C. § 607(d). The ASBCA has jurisdiction to decide appeals regarding contracts made by:
1. The Department of Defense; or
  2. An agency that has designated the ASBCA to decide the appeal.
- D. Standard of Review. The ASBCA will review the appeal de novo. See 41 U.S.C. § 605(a) (indicating that the contracting officer's specific findings of fact are not binding in any subsequently proceedings); see also Wilner v. United States, 24 F.3d 1397 (Fed. Cir. 1994) (en banc); Precision Specialties, Inc., ASBCA No. 48717, 96-1 BCA ¶ 28,054 (final decision retains no presumptive evidentiary weight nor is it binding on the Board).
- E. Perfecting an Appeal.
1. Requirement. A contractor's notice of appeal (NOA) shall be mailed or otherwise furnished to the Board within 90 days from date of receipt of the final decision. A copy shall be furnished to the contracting officer. 41 U.S.C. § 606; ASBCA Rule 1(a). See Cosmic Constr. Co. v. United States, 697 F.2d 1389 (Fed. Cir. 1982) (90 day filing requirement is statutory and cannot be waived by the Board); Rex Sys, Inc., ASBCA No. 50456, 98-2 BCA ¶ 29,956 (refusing to dismiss a contractor's appeal simply because the contractor failed to send a copy of the NOA to the contracting officer).
  2. Filing an appeal with the contracting officer can satisfy the Board's notice requirement. See Hellenic Express, ASBCA No. 47129, 94-3 BCA ¶ 27,189 (citing Yankee Telecomm. Lab., ASBCA No. 25240, 82-2 BCA ¶ 15,515, for the proposition that "filing an appeal with the contracting officer is tantamount to filing with the Board"); cf. Brunner Bau GmbH, ASBCA No. 35678, 89-1 BCA ¶ 21,315 (holding that notice to the government counsel was a filing).

3. Methods of filing.

- a. Mail. The written NOA can be sent to the ASBCA or to the contracting officer via the U.S. Postal Service. See Thompson Aerospace, Inc., ASBCA Nos. 51548, 51904, 99-1 BCA ¶ 30,232 (NOA mailed to KO timely filed).
- b. Otherwise furnishing, such as through commercial courier service. North Coast Remfg., Inc., ASBCA No. 38599, 89-3 BCA ¶ 22,232 (NOA delivered by Federal Express courier service not accorded same status as U.S. mail service and was therefore untimely).

4. Contents. An adequate notice of appeal must:

- a. Be in writing. See Lows Enter., ASBCA No. 51585, 00-1 BCA ¶ 30,622 (holding that verbal notice is insufficient).
- b. Express dissatisfaction with the contracting officer's decision;
- c. Manifest an intent to appeal the decision to a higher authority, see e.g., McNamara-Lunz Vans & Warehouse, Inc., ASBCA No. 38057, 89-2 BCA ¶ 21,636 (concluding that a letter stating that "we will appeal your decision through the various avenues open to us" adequately expressed the contractor's intent to appeal); cf. Stewart-Thomas Indus., Inc., ASBCA No. 38773, 90-1 BCA ¶ 22,481 (stating that the intent to appeal to the board must be unequivocal); Birken Mfg. Co., ASBCA No. 37064, 89-1 BCA ¶ 21,248 (concluding that an electronic message to the termination contracting officer did not express a clear intent to appeal); and
- d. Be timely. 41 U.S.C. § 606; ASBCA Rule 1(a); Thompson Aerospace, Inc., ASBCA Nos. 51548, 51904, 99-1 BCA ¶ 30,232.
  - (1) A contractor must file an appeal with a BCA within 90 days of the date it received the contracting officer's final decision. 41 U.S.C. § 606.
  - (2) In computing the time taken to appeal (See ASBCA Rule 33(b)):

- (a) Exclude the day the contractor received the contracting officer's final decision; and
- (b) Count the day the contractor mailed (evidenced by postmark by U.S. Postal Service) the NOA or that the Board received the NOA.
- (c) If the 90th day is a Saturday, Sunday, or legal holiday, the appeals period shall run to the end of the next business day.

e. The NOA should also:

- (1) Identify the contract, the department or agency involved in the dispute, the decision from which the contractor is appealing, and the amount in dispute; and
- (2) Be signed by the contractor taking the appeal or the contractor's duly authorized representative or attorney.

5. The Board liberally construes appeal notices. See Thompson Aerospace, Inc., ASBCA Nos. 51548, 51904, 99-1 BCA ¶ 30,232 (Board jurisdiction where timely mailing of NOA to KO, despite Board rejecting its NOA mailing).

#### F. Regular Appeals.

- 1. Docketing. ASBCA Rule 3. The Recorder assigns a docket number and notifies the parties in writing.
- 2. Rule 4 (R4) File. ASBCA Rule 4.
  - a. The contracting officer must assemble and transmit an appeal file to the ASBCA and the appellant within 30 days of the date the government receives the docketing notice.
  - b. The R4 file should contain the relevant documents (e.g., the final decision, the contract, and the pertinent correspondence).

- c. The appellant may supplement the R4 file within 30 days of the date it receives its copy.<sup>17</sup>

3. Complaint. ASBCA Rule 6(a).

- a. The appellant must file a complaint within 30 days of the date it receives the docketing notice. But cf. Northrop Grumman Corp., DOT BCA No. 4041, 99-1 BCA ¶ 30,191 (requiring the government to file the complaint on a government claim).

- b. The board does not require a particular format; however, the complaint should set forth:

- (1) Simple, concise, and direct statements of the appellant's claims;
- (2) The basis of each claim; and
- (3) The amount of each claim, if known.

- c. If sufficiently detailed, the board may treat the NOA as the complaint.

4. Answer. ASBCA Rule 6(b).

- a. The government must answer the complaint within 30 days of the date it receives the complaint.
- b. The answer should set forth simple, concise, and direct statements of the government's defenses to each of the appellant's claims, including any affirmative defenses.
- c. The board will enter a general denial on the government's behalf if the government fails to file its answer in a timely manner.

---

<sup>17</sup> As a practical matter, the ASBCA generally allows either party to supplement the R4 file up to the date of the hearing.



5. Discovery. ASBCA Rules 14-15.
  - a. The parties may begin discovery as soon as the appellant files the complaint.
  - b. The board encourages the parties to engage in voluntary discovery.
  - c. Discovery may include depositions, interrogatories, requests for the production of documents, and requests for admission.
6. Pre-Hearing Conferences. ASBCA Rule 10. The board may hold telephonic pre-hearing conferences to discuss matters that will facilitate the processing and disposition of the appeal.
7. Motions. ASBCA Rule 5.
  - a. Parties must file jurisdictional motions promptly; however, the board may defer its ruling until the hearing.
  - b. Parties may also file appropriate non-jurisdictional motions.
8. Record Submissions. ASBCA Rule 11.
  - a. Either party may waive its right to a hearing and submit its case on the written record.
  - b. The parties may supplement the record with affidavits, depositions, admissions, and stipulations when they choose to submit their case on the written record. See Solar Foam Insulation, ASBCA No. 46921, 94-2 BCA ¶ 26,901.
9. Hearings. ASBCA Rules 17-25.
  - a. The board will schedule the hearing and choose the location.
  - b. Hearings are relatively informal; however, the board generally adheres to the Federal Rules of Evidence.

- c. Both parties may offer evidence in the form of testimony and exhibits.
  - d. Witnesses generally testify under oath and are subject to cross-examination.
  - e. The board may subpoena witnesses and documents.
  - f. A court reporter will prepare a verbatim transcript of the proceedings.
10. Briefs. ASBCA Rule 23. The parties may file post-hearing briefs after they receive the transcript and/or the record is closed.
11. Decisions. ASBCA Rule 28.
- a. The ASBCA issues written decisions.
  - b. The presiding judge normally drafts the decision; however, three judges decide the case.
12. Motions for Reconsideration. ASBCA Rule 29.
- a. Either party may file a motion for reconsideration within 30 days of the date it receives the board's decision.
  - b. Motions filed after 30 days are untimely. Bio-temp Scientific, Inc., ASBCA No. 41388, 95-2 BCA ¶ 86,242; Arctic Corner, Inc., ASBCA No. 33347, 92-2 BCA ¶ 24,874.
  - c. Absent unusual circumstances, a party may not use a motion for reconsideration to correct errors in its initial presentation. Metric Constructors, Inc., ASBCA No. 46279, 94-2 BCA ¶ 26,827.
13. Appeals. 41 U.S.C. § 607(g)(1). Either party may appeal to the Court of Appeals for the Federal Circuit (CAFC) within 120 days of the date it receives the board's decision; however, the government needs the consent of the U.S. Attorney General. 41 U.S.C. § 607(g)(1)(B).

G. Accelerated Appeals. 41 U.S.C. § 607(f); ASBCA Rule 12.3.

1. If the amount in dispute is \$100,000 or less, the contractor may choose to proceed under the board's accelerated procedures.
2. The board renders its decision, whenever possible, within 180 days from the date it receives the contractor's election; therefore, the board encourages the parties to limit (or waive) pleadings, discovery, and briefs.
3. The presiding judge normally issues the decision with the concurrence of a vice chairman. If these two individuals disagree, the chairman will cast the deciding vote.
  - a. Written decisions normally contain only summary findings of fact and conclusions.
  - b. If the parties agree, the presiding judge may issue an oral decision at the hearing and follow-up with a memorandum to formalize the decision.
4. Either party may appeal to the CAFC within 120 days of the date it receives the decision.

H. Expedited Appeals. 41 U.S.C. § 608; ASBCA Rule 12.2.

1. If the amount in dispute is \$50,000 or less, the contractor may choose to proceed under the board's expedited procedures.
2. The board renders its decision, whenever possible, within 120 days from the date it receives the contractor's election; therefore, the board uses very streamlined procedures (e.g., accelerated pleadings, extremely limited discovery, etc.).
3. The presiding judge decides the appeal.
  - a. Written decisions contain only summary finds of fact and conclusions.

- b. The presiding judge may issue an oral decision from the bench and follow-up with a memorandum to formalize the decision.
- 4. Neither party may appeal the decision, and the decision has no precedential value. See Palmer v. Barram, 184 F.3d 1373 (Fed. Cir. 1999) (holding that a small claims decision is only appealable for fraud in the proceedings).

#### I. Remedies.

- 1. The board may grant any relief available to a litigant asserting a contract claim in the COFC. 41 U.S.C. § 607(d).
  - a. Money damages is the principal remedy sought.
  - b. The board may issue a declaratory judgment. See Malone v. United States, 849 F.2d 1441 (Fed. Cir. 1988) (validity of T4D).
  - c. The board may award attorney's fees pursuant to the Equal Access to Justice Act (EAJA). 5 U.S.C. § 504. See Hughes Moving & Storage, Inc., ASBCA No. 45346, 00-1 BCA ¶ 30,776 (award decision in T4D case); Oneida Constr., Inc., ASBCA No. 44194, 95-2 BCA ¶ 27,893 (holding that the contractor's rejection of the agency settlement offer, which was more than the amount the board subsequently awarded, did not preclude recovery under the EAJA); cf. Cape Tool & Die, Inc., ASBCA No. 46433, 95-1 BCA ¶ 27,465 (finding rates in excess of the \$75 per hour guideline rate reasonable for attorneys in the Washington D.C. area with government contracts expertise). Q.R. Sys. North, Inc., ASBCA No. 39618, 96-1 BCA ¶ 27,943 (rejecting the contractor's attempt to transfer corporate assets so as to fall within the EAJA ceiling).
- 2. The board need not find a remedy-granting clause to grant relief. See S&W Tire Serv., Inc., GSBCA No. 6376, 82-2 BCA ¶ 16,048 (awarding anticipatory profits).

3. The board may not grant specific performance or injunctive relief. General Elec. Automated Sys. Div., ASBCA No. 36214, 89-1 BCA ¶ 21,195. See Western Aviation Maint., Inc. v. General Services Admin., GSBCA No. 14165, 98-2 BCA ¶ 29,816 (holding that the 1992 Tucker Act amendments did not waive the government's immunity from specific performance suits).

J. Payment of Judgments. 41 U.S.C. § 612.

1. An agency may access the “Judgment Fund” to pay “[a]ny judgment against the United States on a [CDA] claim.” 41 U.S.C. § 612(a). See 31 U.S.C. § 1304; cf. 28 U.S.C. § 2517.
  - a. The Judgment Fund is only available to pay judgments and monetary awards—it is not available to pay informal settlement agreements. See 41 U.S.C. § 612(a)(b); see also 31 U.S.C. § 1304.
  - b. If an agency lacks sufficient funds to cover an informal settlement agreement, it can “consent” to the entry of a judgment against it. See Bath Irons Works Corp. v. United States, 20 F.3d 1567, 1583 (Fed. Cir. 1994); Casson Constr. Co., GSBCA No. 7276, 84-1 BCA ¶ 17,010 (1983). As a matter of policy, however, it behooves the buying activity to coordinate with its higher headquarters regarding the use of consent decrees since the agency must reimburse the Judgment Fund with current funds.
2. Prior to payment, both parties must certify that the judgment is “final” (i.e., that the parties will pursue no further review). 31 U.S.C. § 1304(a). See Inland Servs. Corp., B-199470, 60 Comp. Gen. 573 (1981).
3. An agency must repay the Judgment Fund from appropriations current at the time of the award or judgment. 41 U.S.C. § 612(c). Bureau of Land Management, B-211229, 63 Comp. Gen. 308 (1984).

K. Appealing an Adverse Decision. 41 U.S.C. § 607(g)(1). Board decisions are final unless one of the parties appeals to the CAFC within 120 days after the date the party receives the board's decision. See Placeway Constr. Corp. v. United States, 713 F.2d 726 (Fed. Cir. 1983).

## **VIII. ACTIONS BEFORE THE COURT OF FEDERAL CLAIMS (COFC).**

- A. The right to file suit. Subsequent to receipt of a contracting officer's final decision, a contractor may bring an action directly on the claim in the COFC. 41 U.S.C. § 609(a)(1).
- B. The Court of Federal Claims (COFC).
  - 1. Over a third of the court's workload concerns contract claims.
  - 2. The President appoints COFC judges for a 15-year term with the advice and consent of the Senate.
  - 3. The President can reappoint a judge after the initial 15-year term expires.
  - 4. The Federal Circuit can remove a judge for incompetency, misconduct, neglect of duty, engaging in the practice of law, or physical or mental disability.
  - 5. The Rules of the United States Court of Federal Claims (RCFC) appear in an appendix to Title 28 of the United States Code.
- C. Jurisdiction.
  - 1. The Tucker Act. 28 U.S.C. § 1491(a)(1). The COFC has jurisdiction to decide claims against the United States based on:
    - a. The Constitution;
    - b. An act of Congress;
    - c. An executive regulation; or
    - d. An express or implied-in-fact contract.

2. The Contract Disputes Act (CDA) of 1978. 41 U.S.C. § 609. The Court has jurisdiction to decide appeals from contracting officers' final decisions.
  3. The Federal Courts Administration Act of 1992, Pub. L. No. 102-572, 106 Stat. 4506 (codified at 28 U.S.C. § 1491(a)(2)). The COFC has jurisdiction to decide nonmonetary claims (e.g., disputes regarding contract terminations, rights in tangible or intangible property, and compliance with cost accounting standards) that arise under section 10(a)(1) of the CDA.
- D. Standard of Review. 41 U.S.C. § 609(a)(3). The COFC will review the case de novo. The COFC will not presume that the contracting officer's findings of fact and conclusions of law are valid. Instead, the COFC will treat the contracting officer's final decision as one more piece of documentary evidence and weigh it with all of the other evidence in the record. Wilner v. United States, 24 F.3d 1397 (Fed. Cir. 1994) (en banc) (overruling previous case law that a contracting officer's final decision constitutes a "strong presumption or an evidentiary admission" of the government's liability).
- E. Perfecting an Appeal.
1. Timeliness. 41 U.S.C. § 609(a); RCFCs 3 and 6.
    - a. A contractor must file its complaint within 12 months of the date it received the contracting officer's final decision. See Janicki Logging Co. v. United States, 124 F.3d 226 (Fed. Cir. 1997) (unpub.); K&S Constr. v. United States, 35 Fed. Cl. 270 (1996); see also White Buffalo Constr., Inc. v. United States, 28 Fed. Cl. 145 (1992) (filing one day after the expiration of the 12 month period rendered it untimely).
    - b. In computing the appeals period, exclude:
      - (1) The day the contractor received the contracting officer's decision; and
      - (2) The last day of the appeals period if that day is:
        - (a) A Saturday, Sunday, or federal holiday; or

- (b) A day on which weather or other conditions made the Clerk of Court's office inaccessible.

c. The COFC may deem a late complaint timely if:

- (1) The plaintiff sent the properly addressed complaint by registered or certified mail, return receipt requested;
- (2) The plaintiff deposited the complaint in the mail sufficiently in advance of the due date to permit its timely receipt in the ordinary course of the mail; and
- (3) The plaintiff exercised no control over the complaint from the time of mailing to the time of delivery.

See B. D. Click Co. v. United States, 1 Cl. Ct. 239 (1982)  
(concluding that the contractor failed to demonstrate the applicability of the exception to the timeliness rules).

d. The Fulford Doctrine. See para. VI.F.3, above.

2. Filing Method. RCFC 3. The contractor must deliver its complaint to the Clerk of Court.

3. Contents. RCFC 8(a); RCFC 9(h).

a. If the complaint sets forth a claim for relief, the complaint must contain:

- (1) A "short and plain" statement regarding the COFC's jurisdiction;
- (2) A "short and plain" statement showing that the plaintiff is entitled to relief; and
- (3) A demand for a judgment.



b. In addition, the complaint must contain, inter alia:

- (1) A statement regarding any action taken on the claim by Congress, a department or agency of the United States, or another tribunal;
- (2) A clear citation to any statute, regulation, or executive order upon which the claim is founded; and
- (3) A description of any contract upon which the claim is founded.

4. The Election Doctrine. See para. II.B.3, above.

F. Procedures.

1. Process. RCFC 4. The Clerk of Court serves 5 copies of the complaint on the Attorney General (or the Attorney General's designated agent).
2. "Call Letter." 28 U.S.C. § 520.
  - a. The Attorney General must send a copy of the complaint to the responsible military department.
  - b. In response, the responsible military department must provide the Attorney General with a "written statement of all facts, information, and proofs."
3. Answer. RCFCs 8, 12, and 13. The government must answer the complaint within 60 days of the date it receives the complaint.
4. The court rules regulate discovery and pretrial procedures extensively, and the court may impose monetary sanctions for noncompliance with its discovery orders. See M. A. Mortenson Co. v. United States, 996 F.2d 1177 (Fed. Cir. 1993).

5. Decisions may result from either a motion or a trial. Procedures generally mirror those of trials without juries before federal district courts. The judges make written findings of fact and state conclusions of law.

G. Remedies.

1. The COFC has jurisdiction “to afford complete relief on any contract claim brought before the contract is awarded including declaratory judgments, and such equitable and extraordinary relief as it deems proper.” Federal Courts Improvements Act of 1982, Pub. L. No. 97-164, 96 Stat. 40 (codified at 28 U.S.C. § 1491(a)(3)). See Sharman Co., Inc. v. United States, 2 F.3d 1564 (Fed. Cir. 1993).
2. The COFC has no authority to issue injunctive relief or specific performance, except for reformation in aid of a monetary judgment, or rescission instead of monetary damages. See John C. Grimberg Co. v. United States, 702 F.2d 1362 (Fed. Cir. 1983); Rig Masters, Inc. v. United States, 42 Fed. Cl. 369 (1998); Paragon Energy Corp. v. United States, 645 F.2d 966 (Ct. Cl. 1981).
3. The COFC may award EAJA attorneys’ fees. 28 U.S.C. § 2412.

H. Payment of Judgments. See para. VII.J., above.

I. Appealing an Adverse Decision.

1. Unless timely appealed, a final judgment bars any further claim, suit, or demand against the United States arising out of the matters involved in the case or controversy. 28 U.S.C. § 2519.
2. A party must appeal a final judgment to the CAFC within 60 days of the date the party receives the adverse decision. 28 U.S.C. § 2522. See RCFC 72.

**IX. APPEALS TO THE COURT OF APPEALS FOR THE FEDERAL CIRCUIT (CAFC).**

A. National Jurisdiction.

1. The Federal Circuit has national jurisdiction. Dewey Elec. Corp. v. United States, 803 F.2d 650 (Fed. Cir. 1986); Teller Envtl. Sys., Inc. v. United States, 802 F.2d 1385 (Fed. Cir. 1986).
  2. The Federal Circuit also exclusive jurisdiction over appeals from an agency BCA and the COFC pursuant to section 8(g)(1) of the CDA. 28 U.S.C. § 1295(a)(3) and (10).
- B. Standard of Review. 41 U.S.C. § 609(b).
1. Jurisdiction. The court views jurisdictional challenges as “pure issues of law,” which it reviews de novo. See Transamerica Ins. Corp. v. United States, 973 F.2d 1572, 1576 (Fed. Cir. 1992).
  2. Findings of Fact. Findings of fact are final and conclusive unless they are fraudulent, arbitrary, capricious, made in bad faith, or not supported by substantial evidence. 49 U.S.C. § 609(b). See United States v. General Elec. Corp., 727 F.2d 1567, 1572 (Fed. Cir. 1984) (holding that the court will affirm a board’s decision if there is “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion”); Tecom, Inc. v. United States, 732 F.2d 935, 938 n.4 (Fed. Cir. 1995) (finding that the trier of fact’s credibility determinations are virtually unreviewable).
- C. Frivolous Appeals. The court will assess damages against parties filing frivolous appeals. See Dungaree Realty, Inc. v. United States, 30 F.3d 122 (Fed. Cir. 1994); Wright v. United States, 728 F.2d 1459 (Fed. Cir. 1984).
- D. Supreme Court Review. The U.S. Supreme Court reviews decisions of the Federal Circuit by writ of certiorari.

## **X. CONTRACT ATTORNEY RESPONSIBILITIES IN THE DISPUTES PROCESS.**

- A. Actions upon Receipt of a Claim.
1. Review the claim and check the agency’s facts and theories.
  2. Verify that the contractor has properly certified all claims exceeding \$100,000.

3. Advise the contracting officer to consider business judgment factors, as well as legal issues.

B. Contracting Officer's Final Decision.

1. Prior to reviewing the final decision, determine whether the claim should be certified. If the claim exceeds \$100,000, ensure that a person authorized to bind the contractor properly certified the claim.
2. Ensure that the subject of the final decision is a nonroutine request for payment, rather than a contractor's invoice or preliminary request for adjustment.
3. Review the final decision for sufficiency of factual and legal reasoning.
4. Ensure that the decision letter properly sets forth the contractor's appeal rights.

C. R4 File.

1. Oversee the preparation of the Rule 4 file. If possible, coordinate with the trial counsel assigned to the appeal as to what documents to include/omit from the Rule 4 file.
2. Put privileged documents in a separate litigation file for transmission to the trial attorney.

D. Discovery.

1. Assist the trial attorney in formulating a discovery plan.
2. Identify knowledgeable government and contractor personnel and conduct preliminary interviews of government witnesses.
3. Draft interrogatories, requests for documents, requests for admissions, and other discovery requests. Prepare draft responses to any discovery requests propounded by the appellant.

4. Assist the trial counsel during depositions (e.g., by identifying key contractor personnel and pertinent documents related to the dispute). Coordinate with the trial counsel regarding the feasibility of conducting one or more depositions.

E. Hearings.

1. Through the trial attorney, coordinate with the Chief Trial Attorney concerning appearing as counsel of record.
2. To the extent practicable, assist in witness and evidence preparation.
3. Assist in the preparation and/or review of post-hearing briefs.

F. Client Expectations. Assist the trial attorney in providing the contracting officer and other interested parties regular status updates regarding the appeal.

G. Settlement. Work with the contracting officer and the trial attorney regarding the costs and benefits of litigating the claim. Strive for a position that reflects sound business judgment and protects the interests of the government.

**XI. CONCLUSION.**



## **ATTACHMENT A**

### 52.233-1 Disputes.

As prescribed in 33.215, insert the following clause:

#### **Disputes (July 2002)**

(a) This contract is subject to the Contract Disputes Act of 1978, as amended (41 U.S.C. 601-613).

(b) Except as provided in the Act, all disputes arising under or relating to this contract shall be resolved under this clause.

(c) "Claim," as used in this clause, means a written demand or written assertion by one of the contracting parties seeking, as a matter of right, the payment of money in a sum certain, the adjustment or interpretation of contract terms, or other relief arising under or relating to this contract. However, a written demand or written assertion by the Contractor seeking the payment of money exceeding \$100,000 is not a claim under the Act until certified. A voucher, invoice, or other routine request for payment that is not in dispute when submitted is not a claim under the Act. The submission may be converted to a claim under the Act, by complying with the submission and certification requirements of this clause, if it is disputed either as to liability or amount or is not acted upon in a reasonable time.

(d)(1) A claim by the Contractor shall be made in writing and, unless otherwise stated in this contract, submitted within 6 years after accrual of the claim to the Contracting Officer for a written decision. A claim by the Government against the Contractor shall be subject to a written decision by the Contracting Officer.

(2)(i) The Contractor shall provide the certification specified in paragraph (d)(2)(iii) of this clause when submitting any claim exceeding \$100,000.

(ii) The certification requirement does not apply to issues in controversy that have not been submitted as all or part of a claim.

(iii) The certification shall state as follows: "I certify that the claim is made in good faith; that the supporting data are accurate and complete to the best of my knowledge and belief; that the amount requested accurately reflects the contract adjustment for which the Contractor believes the Government is liable; and that I am duly authorized to certify the claim on behalf of the Contractor."

(3) The certification may be executed by any person duly authorized to bind the Contractor with respect to the claim.

(e) For Contractor claims of \$100,000 or less, the Contracting Officer must, if requested in writing by the Contractor, render a decision within 60 days of the request. For Contractor-

certified claims over \$100,000, the Contracting Officer must, within 60 days, decide the claim or notify the Contractor of the date by which the decision will be made.

(f) The Contracting Officer's decision shall be final unless the Contractor appeals or files a suit as provided in the Act.

(g) If the claim by the Contractor is submitted to the Contracting Officer or a claim by the Government is presented to the Contractor, the parties, by mutual consent, may agree to use alternative dispute resolution (ADR). If the Contractor refuses an offer for ADR, the Contractor shall inform the Contracting Officer, in writing, of the Contractor's specific reasons for rejecting the offer.

(h) The Government shall pay interest on the amount found due and unpaid from (1) the date that the Contracting Officer receives the claim (certified, if required); or (2) the date that payment otherwise would be due, if that date is later, until the date of payment. With regard to claims having defective certifications, as defined in FAR 33.201, interest shall be paid from the date that the Contracting Officer initially receives the claim. Simple interest on claims shall be paid at the rate, fixed by the Secretary of the Treasury as provided in the Act, which is applicable to the period during which the Contracting Officer receives the claim and then at the rate applicable for each 6-month period as fixed by the Treasury Secretary during the pendency of the claim.

(i) The Contractor shall proceed diligently with performance of this contract, pending final resolution of any request for relief, claim, appeal, or action arising under the contract, and comply with any decision of the Contracting Officer.

(End of clause)

*Alternate I (Dec 1991).* As prescribed in 33.215, substitute the following paragraph (i) for paragraph (i) of the basic clause:

(i) The Contractor shall proceed diligently with performance of this contract, pending final resolution of any request for relief, claim, appeal, or action arising under or relating to the contract, and comply with any decision of the Contracting Officer.



## **CHAPTER 17**

### **CONTINGENCY AND DEPLOYMENT CONTRACTING**

<b>I. REFERENCES.....</b>	<b>1</b>
<b>II. INTRODUCTION.....</b>	<b>3</b>
A. Objectives .....	3
B. Background.....	3
C. Applicable Law During a Deployment .....	3
D. Wartime Funding .....	5
E. Wartime Contract Law.....	5
<b>II. PREPARATION FOR DEPLOYMENT CONTRACTING .....</b>	<b>5</b>
A. General Considerations .....	5
B. Contracting Officer/Ordering Officer Support .....	5
C. Administrative Needs .....	6
D. Finance and Funding Support .....	8
<b>III. CONTRACTING DURING A DEPLOYMENT .....</b>	<b>9</b>
A. Training and Appointing Contracting Personnel .....	9
B. Contracting Support Kit.....	9
C. Requirements Generation .....	9
D. Competition Requirements .....	9
E. Contract Type.. .....	11
F. Methods of Acquisition .....	12
G. Sealed Bidding as a Method of Acquisition .....	12
H. Negotiations as a Method of Acquisition .....	13

I.	Simplified Acquisition Procedures .....	14
J.	Other contracting considerations .....	20
K.	Using Existing Contracts to Satisfy Requirements.....	21
L.	Contract Administration, Changes, Quality Assurance, and Terminations .....	21
M.	Alternative Methods for Fulfilling Requirements.....	23
N.	Leases of Real Property. ....	25
<b>IV.</b>	<b>POLICING THE CONTRACT BATTLEFIELD.....</b>	<b>25</b>
A.	Ratification.....	25
B.	Extraordinary Contractual Actions .....	26
C.	Government Accountability Office (GAO) Claims. ....	27
D.	Claims Under the Contract Disputes Act.....	27
E.	Redeployment. ....	28
<b>V.</b>	<b>INTERNATIONAL LAW CONSIDERATIONS IN THE ACQUISITION OF SUPPLIES AND SERVICES DURING MILITARY OPERATIONS .....</b>	<b>28</b>
A.	U.S. Rights and Obligations Under International Law Relating to Battlefield Procurement of Goods.....	28
B.	Acquisition of Enemy Property in Combat.....	28
C.	Acquisition of Enemy Property in Occupied Territories.....	29
D.	U.S. Rights and Obligations Under International Law Relating to Battlefield Procurement of Services.....	30
E.	Use of Prisoners of War as a Source for Services During War .....	30
F.	Use of Civilian Persons as a Source for Services During War .....	30
G.	Practical Considerations Concerning the Use of International Law Principles for Acquisition of Supplies and Services .....	30
<b>VI.</b>	<b>CONTRACTORS ON THE BATTLEFIELD.....</b>	<b>31</b>
A.	Civilian contractors.....	31

B. Three categories of contractors.....	31
C. Contractor status in foreign country .....	31
D. Discipline.....	32
E. Compensation .....	32
F. Work Hours.....	33
H. Continued Performance During a Crisis .....	34
I. Security/Force Protection .....	34
<b>VII. CONCLUSION. ....</b>	<b>35</b>
<b>ATTACHMENT A.....</b>	<b>36</b>



## CHAPTER 17

### CONTINGENCY AND DEPLOYMENT CONTRACTING

#### I. REFERENCES.

- A. Army Federal Acquisition Regulation Manual No. 2 (Contingency Contracting), Nov. 1997.
- B. Air Force FAR Supplement, Appendix CC - Contingency Operational Contracting Support Program (COCSP), 1 May 2003.
- C. NAVSUP Instruction 4230.37A, 9 April 1996.
- D. Marine Corps Order (MCO) P4200.15G, Appendix B. Marine Corps Purchasing Procedures Manual
- E. Joint Pub. 1-06. Joint Tactics, Techniques, and Procedures for Financial Management During Joint Operations, 22 Dec 99.
- F. Joint Pub. 4-0. Doctrine for Logistics Support of Joint Operations, 6 April 2000. (Chapter V, Contractors in Theater)
- G. Joint Pub. 4-07, Joint Tactics, Techniques, and Procedures for Common-User Logistics During Joint Operations, 11 June 2001.
- H. Joint Pub. 4-08, Joint Doctrine for Logistic Support to Multinational Operations, 25 Sep 2002.
- I. Field Manual (FM) 27-100, Legal Support of Operations, 1 March 2000.

#### J. LOGCAP Related Resources.

1. AR 700-137, Logistics Civil Augmentation Program (LOGCAP), 16 Dec. 85.

2. AMC PAM 700-30, Logistics Civil Augmentation Program (LOGCAP), 31 Jan. 00.

**Deleted:** <#>LOGCAP Resources:  
<#>AR 700-137, Logistics Civil Augmentation Program (LOGCAP), 16 Dec. 85.  
<#>AR 715-9, Contractors Accompanying the Force, 29 Oct. 99.  
<#>DA PAM 715-16, Contractor Deployment Guide, 27 Feb. 98.  
<#>AMC PAM 700-30. Logistics Civil Augmentation Program (LOGCAP), 31 Jan. 00.  
<#>AMC LOGCAP Battle Book, 31 Jan. 00.

**Formatted:** Numbered + Level: 1 +  
Numbering Style: A, B, C, ... + Start  
at: 1 + Alignment: Left + Aligned at:  
36 pt + Tab after: 54 pt + Indent  
at: 54 pt

**Deleted:** ¶

**Formatted:** Bullets and Numbering

**Deleted:** LTC Karl Kuhn

**Formatted:** Numbered + Level: 1 +  
Numbering Style: 1, 2, 3, ... + Start  
at: 1 + Alignment: Left + Aligned at:  
72 pt + Tab after: 90 pt + Indent  
at: 90 pt

**Deleted:** 3rd

**Deleted:** 4

MAJ Michael Norris  
54th Graduate Course  
Fall 2005

3. AMC PAM 715-18, AMC Contracts and Contractors Supporting Military Operations, June 2000.

Formatted: Bullets and Numbering

4. AMC LOGCAP Battle Book, 31 Jan. 00.

Formatted: Bullets and Numbering

5. AMC LOGCAP Homepage: <http://www.amc.army.mil/LOGCAP/>.

Formatted: Bullets and Numbering

6. DA PAM 700-31, Commander's Handbook for Peacekeeping Operations (A Logistics Perspective), 1 July 94.

7. DA PAM 700-15, Logistics Support of United Nations Peacekeeping Forces, 1 May 86.

8. DA PAM 690-80/NAVSO P-1910/AFM 40-8/MCO P12910.1, Use and Administration of Local Civilians in Foreign Areas During Hostilities, 12 Feb. 71.

Deleted: ¶

Formatted: Numbered + Level: 1 + Numbering Style: 1, 2, 3, ... + Start at: 1 + Alignment: Left + Aligned at: 72 pt + Tab after: 90 pt + Indent at: 90 pt

K. FM 3-100.21 (supercedes FM 100-21), Contractors on the Battlefield, 3 Jan. 03.

Deleted: <#>FM 4-100.2 (aka FM 100-10-2), Contracting Support on the Battlefield, 15 Apr. 99.¶

L. FM 100-10-2 (aka 4-100.2), Contracting Support on the Battlefield, 4 Aug. 99.

Formatted: Bullets and Numbering

M. CLAMO CD-ROM: Deployed Judge Advocate Resource Library, Seventh Edition.

Formatted: Numbered + Level: 1 + Numbering Style: A, B, C, ... + Start at: 1 + Alignment: Left + Aligned at: 36 pt + Tab after: 54 pt + Indent at: 54 pt

N. Air Force Contract Augmentation Program (AFCAP) homepage: <http://www.afcap.com/>.

Formatted: Bullets and Numbering

O. Defense Acquisition Deskbook, Contractor Support in the Theater of Operations, Deskbook Supplement, 28 March 2001. Available at: <http://www.dscp.dla.mil/contract/doc/contractor.doc>.

Deleted: Fifth

Deleted: <https://wwwmil.afcesa.af.mil/Directorate/CEX/CEXX/AFCAP/afcap.html>.

Formatted: Numbered + Level: 1 + Numbering Style: A, B, C, ... + Start at: 1 + Alignment: Left + Aligned at: 36 pt + Tab after: 54 pt + Indent at: 54 pt, Don't adjust space between Latin and Asian text

P. AT&L Knowledge Sharing System (AKSS) Acquisition Deskbook CD-ROM. Subscription available from: <http://deskbook.dau.mil/jsp/default.jsp>.

Deleted: ¶

Formatted: Bullets and Numbering

Q. AR 715-30, Secure Environment Contracting (20 Nov. 2002).

Formatted: Bullets and Numbering

R. AR 715-9, Contractors Accompanying the Force, 29 Oct. 99 (currently being revised).

S. DA PAM 715-16, Contractor Deployment Guide, 27 Feb. 98 (will be combined with the new AR 715-9, which is currently being revised).

Formatted: Heading 3, TJAGSA 3, Numbered + Level: 1 + Numbering Style: A, B, C, ... + Start at: 1 + Alignment: Left + Aligned at: 36 pt + Tab after: 54 pt + Indent at: 54 pt

T. The Army Lawyer, January issue, annual Contract & Fiscal Law Year-in-Review article. Article contains updates on deployment contracting, Foreign Military Sales, Construction Contracting & Funding, and Operational Funding.

Formatted: Bullets and Numbering

U. References on JAGCNET: <http://www.jagcnet.army.mil/>. (Also available on the TJAGSA homepage: <http://www.jagcnet.army.mil/TJAGSA>. Once you reach the school's homepage, toggle on "Publications." No password or registration is required.)

## II. INTRODUCTION.

A. Objectives. Following this block of instruction, students should:

1. Understand the importance of planning for contracting operations during deployments.
2. Understand the typical contracting, finance, and resource management personnel support for contingency contracting.
3. Understand the more frequently used methods of acquiring supplies and services during deployments.
4. Understand the ratification process used to correct irregular procurements.

Deleted: ¶  
-----Page Break-----

B. Background.

Formatted: Heading 2, TJAGSA 2

C. Applicable Law During a Deployment.

Deleted: ¶  
¶

1. International Law.

Deleted: —

a. The Law of War — Combat.

- b. The Law of War – Occupation. This body of law may be directly applicable, or followed as a guide when no other laws clearly apply, such as in Somalia during Operation Restore Hope.

Deleted: —

- c. International Agreements. A variety of international agreements may impact contracting operations in OCONUS locations.

(1) Status of Forces Agreements (SOFA) or other status agreements may contain provisions impacting upon contracting activities.

(2) Specific treaties or agreements may also impact contracting activities.

2. U.S. Contract and Fiscal Law.

- a. Armed Services Procurement Act of 1947, as amended. 10 U.S.C. § 2301-31.

- b. Federal Acquisition Regulation (FAR) and Agency Supplements.

(1) FAR Part 25 and DFARS Part 225 govern foreign acquisitions.

(2) Various service specific supplementary manuals provide a basic guide to contingency contracting and are highly recommended for a general overview of government acquisition. *See, e.g.* Army Federal Acquisition Regulation Manual No. 2 (Contingency Contracting), Nov. 1997; Air Force FAR Supplement, Appendix CC - Contingency Operational Contracting Support Program (COCSP), 1 May 2003; NAVSUP Instruction 4230.37A, 9 April 1996; Marine Corps Order (MCO) P4200.15G, Appendix B. Marine Corps Purchasing Procedures Manual.

- c. Fiscal Law. Title 31, U.S. Code; DOD Reg. 7000.14-R, Financial Mgmt. Reg., vol. 5, Disbursing Policies and Procedures; DFAS-IN 37-1; DFAS Manual 37-100-XX (XX= current FY).

Deleted: ¶



- D. Wartime Funding. Congressional declarations of war and similar resolutions may result in subsequent legislation authorizing the President and heads of military departments to expend appropriated funds to prosecute the war as they see fit.
- E. Wartime Contract Law. Congress has authorized the President and his delegees to initiate contracts that facilitate national defense notwithstanding any other provision of law. 50 U.S.C. § 1431-35; Executive Order 10,789 (Nov. 14, 1958); FAR Part 50.

## II. PREPARATION FOR DEPLOYMENT CONTRACTING.

- A. General Considerations. *See* Chapter 3, FM [100-10-2 \(aka FM 4-100.2\)](#), Contracting Support on the Battlefield, [4 Aug](#), 99.

Deleted: 15 Apr

Deleted: (aka FM 100-10-2)

1. Plan early for contracting during a deployment.
2. Identify and train personnel necessary for effective contracting in an overseas theater.
3. Plan to deploy contracting personnel/teams with units to hit the ground first.
4. Allocate assets necessary to support contracting efforts from current unit resources.

- B. Contracting Officer (KO)/ Field Ordering Officer (FOO) Support. *See* Section III, FM [100-10-2 \(aka 4-100.2\)](#), Contracting Support on the Battlefield, [4 Aug](#), 99.

Deleted: (aka FM 100-10-2)

Deleted: 15 Apr

1. Identify KO/FOO support requirements.
2. Ensure proper appointment and training of KOs and FOOs.
  - a. Only contracting officers and their authorized representatives may obligate government funds.
  - b. Contracting officers (KO) receive their appointments from a Head of a Contracting Activity (HCA) or certain officials in the Army Secretariat. FAR 1.603; AFARS 5101.603-1.

- c. Contingency Contracting Officers (CCO) are special contracting officers that should be trained to operate in austere deployed environments and to work with contractors that may have limited knowledge of U.S. Government contracting practices.
- d. Field Ordering Officers (FOO) normally receive their appointments from a chief of a contracting office. AFARS 5101.602-2-90. A sample appointment letter is found at AFARS 5153.9002.
  - (1) Responsibilities. AFARS Manual No. 2, Appendix E.
  - (2) “Class A” paying agents may not be ordering officers. AFARS Manual No. 2, para. 1-2.i.
- e. Contracting officers and ordering officers are subject to limitations in appointment letters, regulations, and statutes.
- f. Training for contracting personnel must include procurement integrity and standards of conduct training. FAR 3.104; DOD Dir. 5500.7-R, Joint Ethics Regulation.
- g. Appointing authorities may limit contracting authority by dollar amount, subject matter, purpose, time, etc., or they may provide unlimited authority. Typical limitations are restrictions on the types of items that may be purchased, and on per purchase dollar amounts. FAR 1.603-3.
- h. Contracting officers execute, administer, or terminate contracts and make determinations and findings permitted by statute and regulation. FAR 1.602-1.

C. Administrative Needs.

- 1. Deployable units should assemble contracting support kits. Administrative needs forgotten may be difficult to obtain in the area of operations. Kits should contain a 90-day supply of administrative needs. See Appendix F, AFARS Manual No. 2.

2. CCOs should consider deploying with “bulk funding” in order to have readily available certified funds to establish the contingency contracting office without needing to seek specific certified funds for each separate acquisition. *See* p. 3-19, FM [100-10-2 \(aka FM 4-100.2\)](#), Contracting Support on the Battlefield, [4 Aug](#), 99

Deleted: 15 Apr

Deleted: (aka FM 100-10-2

3. Legal references.

- a. Statutes: Titles 10, 31, and 41 of the U.S. Code.
- b. Regulations: FAR; DFARS; AFARS/AFFARS/NAPS; DOD Reg. 7000.14-R, Financial Mgmt. Reg., vol. 5, Disbursing Policies and Procedures; DFAS-IN 37-1; DFAS-IN Manual 37-100-XX (XX = current FY); and command supplements to these publications.
- c. CD-ROM contract references and LEXIS/WESTLAW software.
- d. Access to Internet.

4. Contract forms.

- a. DD Form 1155, Purchase Order. See, DFARS 213.307.
- b. Standard Form 44, Purchase Order-Invoice-Voucher. See, DFARS 213.306.
- c. Standard Forms 26, Award/Contract; 30, Amendment; 33, Solicitation, Offer & Award; 1442, Construction SO&A; and 1449, Commercial Items.
- d. Form specifications for common items.
  - (1) Subsistence items, such as bottled water, fruit, etc.
  - (2) Labor and other services.
  - (3) Fuel.

- (4) Billeting.
- (5) Construction materials: plywood, gravel.
- (6) Common items, such as fans, heaters, air-conditioners, etc.
- e. Translations of contracting forms and provisions.
- 5. Portable office equipment and office supplies.
- 6. Personnel, including clerical support and translators. Host nation contracted support personnel may also have specific knowledge of the local vendor base, and business practices.
- D. Finance and Funding Support. *See* page 3-10 Funding Contracted Support, FM [100-10-2](#).
- 1. Certified funding. A deployable unit should coordinate to have funds certified as available in bulk to support deployment purchases. The Finance Officer should provide a bulk-funded DA Form 3953, Purchase Request and Commitment (PR&C), to any deploying unit. (USAF: AF Form 9, USN: NAVCOMPT Form 2276/2275.)
- 2. Imprest funds. FAR Subpart 13.305; DFARS Subpart 213.305; DOD Reg. 7000.14-R, Financial Mgmt. Reg., vol. 5, Disbursing Policies and Procedures, paras. 020901-020908. [See also AFARS Manual No. 2, Appendix B.](#)
  - a. The installation commander may establish imprest funds of up to \$10,000.
  - b. Cashiers must receive adequate training.
  - c. The fund operates like a petty cash fund, and is replenished as payments are made.
  - d. Authorized individuals make purchases and provide receipts to cashier.

Deleted: 4-100.2

- e. The fund should include local currency.
- 3. “Class A” paying agents. Units must ensure personnel are properly appointed and trained. See DOD Reg. 7000.14-R, Financial Mgmt. Reg., vol. 5, Disbursing Policies and Procedures, para. 020604.

### III. CONTRACTING DURING A DEPLOYMENT.

#### A. Training and Appointing Contracting Personnel.

- 1. Units should ensure that contracting personnel have received necessary training. If time permits, provide centralized refresher training.
- 2. Review letters of appointment for contracting officers and ordering officers. Ensure that personnel know the limitations on their authority.

#### B. Contracting Support Kit. Review contents of the kit. Ensure that references include latest changes.

#### C. Requirements Generation.

- 1. Verification. Ensure that the G-4/J-4 for the operation reviews and approves requirements, to avoid purchases better filled through the supply system. AFARS Manual No. 2, paras. 2-3. Verification of requirements is now primarily accomplished by an “acquisition review board,” or “ARB,” or a “Joint Acquisition Review Board” or “JARB,” in the joint environment. *See*, AMC LOGCAP Battle Book, at 53 and page 2-13, FM 100-10-2.

Deleted: 4-

Deleted: .2

- 2. The Joint Force Contracting Office(s) or the JARB will ensure that acquisitions are coordinated to preclude inter-service and inter-component competition for scarce resources in the theater. JOINT PUB. 3-57, JOINT DOCTRINE FOR CIVIL-MILITARY OPERATIONS (8 Feb. 2001), at III-21.

Formatted: Bullets and Numbering

- 3. Statement of Work development. See AFARS Manual No. 2, para. 7-6.

Formatted: Bullets and Numbering

Deleted: (SOW)

#### D. Competition Requirements.

1. The government must seek competition for its requirements; normally full and open competition, affording all responsible sources an opportunity to compete, is required. 10 U.S.C. § 2304; FAR Part 6, FAR 2.101. There is no automatic deployment contracting exception.

a. The statutory requirement for full and open competition for purchases over the simplified acquisition threshold creates a 45-day minimum procurement administrative lead-time (PALT).

Deleted: .

b. The 45-day PALT results from a requirement to publish notice of proposed acquisitions for 15 days (synopsizing the contract actions), and then to provide a minimum of 30 days for offerors to submit bids or proposals.

Deleted: hree

c. Two additional time periods extend the minimum 45-day PALT:

Deleted:

(1) time needed for requirement definition and solicitation preparation;

(2) time needed for evaluation of offers and award of the contract; and time needed for delivery of supplies.

Deleted: ; or  
(3) . contractual performance of services.

2. Exceptions to the rule.

a. Unusual and compelling urgency. 10 U.S.C. § 2304 (c)(2); 41 U.S.C. § 253 (c)(2); FAR 6.302-2.

(1) This exception authorizes a contract action without full and open competition. It permits the contracting officer to limit the number of sources solicited to those who are able to meet the requirements in the limited time available. FAR 6.302-2.

(2) This exception also authorizes an agency to dispense with publication periods (minimum 45-day PALT) if the government would be injured seriously by this delay. It also allows preparation of written justifications after contract award. FAR 6.302-2(c)(1).

b. National security may provide a basis for limiting competition. It may apply if contingency plans are classified. FAR 6.302-6.

c. Public interest is another exemption to full and open competition, but only the head of the agency can invoke it. FAR 6.302-7.

d. Use of the unusual and compelling urgency, and national security exceptions requires a Justification and Approval (J&A). FAR 6.303. Approval levels for justifications are (FAR 6.304):

Deleted: , and public interest

(1) Actions under \$500,000: the contracting officer.

(2) Actions from \$500,000 to \$10 million: the competition advocate.

(3) Actions from \$10 million to \$50 million: the HCA or designee.

(4) Actions above \$50 million: the agency senior procurement executive, DFARS 202.101.

Deleted: acquisition executive

e. Contract actions made and performed outside the United States, its possessions, or Puerto Rico, for which only local sources are solicited, are exempt from compliance with the minimum 45-day PALT time period, but not from the requirement for competition. See FAR 5.202 (a)(12); FAR 5.203; see also FAR 14.202-1(a) (thirty-day bid preparation period only required if solicitation is synopsisized). Use bid boards and local advertisements to obtain competition under these circumstances. AFARS Manual No. 2, para. 4-3.e and FAR 5.101(a)(2) & (b).

E. Contract Type. Although the contracting officer may select from a variety of contract types, firm-fixed-price contracts are used most often during deployments. See FAR Part 16; AFARS Manual No. 2, para. 8-4d(4). However, LOGCAP and Force “Sustainment” contracts are cost-plus-award-fee contracts.

Deleted: 9-2

1. Letter contracts and oral solicitations can expedite the contracting process in contingency operations.

a. Letter contracts are preliminary contractual instruments that permit a contractor to begin work immediately. Approvals for use at the HCA level are required. See FAR 16.603; AFARS Manual No. 2, para. 8-4.d(5).

b. Oral solicitations are permissible when the delay in preparing a written solicitation would be harmful to the government. Use of oral solicitations does not excuse compliance with normal contracting requirements. See AFARS Manual No. 2, para. 8-2.b.

Formatted: Bullets and Numbering

2. For an example of the types of procedures that will likely be employed to support contingency operations, see Memorandum, Office of the Assistant Secretary of the Air Force, Deputy Assistant Secretary (Contracting), subject: Rapid, Agile Contracting Support During Operation Iraqi Freedom, (21 March 2003) (listing undefinitized contract actions, urgent and compelling Justification and Authorizations, options for increased quantities, and accelerated delivery options as methods to be explored and utilized to support combat operations) available at: <http://www.safaq.hq.af.mil/contracting/policy/AOC/info-2003/op-iraqi-freedom-21mar03.pdf>. See also Memorandum, Office of the Under Secretary of Defense, Director Defense Procurement and Acquisition Policy, subject: Emergency Procurement Flexibilities (20 May 2004) available at <http://www.acq.osd.mil/dpap/policy/policydocs.htm>

#### F. Methods of Acquisition.

1. Sealed bidding: award is based only on price and price-related factors, and is made to the lowest, responsive, responsible bidder. FAR Part 14.
2. Negotiation: award is based on stated evaluation criteria, one of which must be cost, and is made to the responsible offeror whose proposal offers either the low-cost, technically acceptable solution to the government's requirement, or the one representing the best cost – technical tradeoff, even if it is not lowest in cost. FAR Part 15.
3. Simplified acquisition procedures: used for the acquisition of supplies, nonpersonal services, and construction in amounts below the simplified acquisition threshold. FAR Part 13.

#### G. Sealed Bidding as a Method of Acquisition.



1. Contracting officers must use sealed bidding procedures if the four conditions enumerated in the Competition in Contracting Act are present. 10 U.S.C. § 2304(a)(2)(A); Racal Filter Technologies, Inc., B-240579, Dec. 4, 1990, 70 Comp. Gen. 127, 90-2 CPD ¶ 453.
  - a. Time permits the solicitation, submission, and evaluation of sealed bids;
  - b. Award will be based only on price and other price-related factors;
  - c. It is not necessary to conduct discussions with responding sources about their bids; and
  - d. There is a reasonable expectation of receiving more than one sealed bid.
2. Use of sealed bidding allows little discretion in the selection of a source. A clear description or understanding of the requirement is necessary to avoid discussions.
3. Sealed bidding normally is not used in deployment contracting, at least until the tactical situation stabilizes. It requires more sophisticated contractors, because minor errors in preparing bids will prevent government acceptance.

Deleted: 4

#### H. Negotiations as a Method of Acquisition.

1. Contracting Officers use negotiations, which are sometimes called competitive proposal procedures, when sealed bidding is not appropriate. 10 U.S.C. § 2304(a)(2)(B).
2. Negotiations permit greater discretion in the selection of a source.
  - a. Because the government evaluates other criteria in addition to price in a negotiated procurement, substantial time may be required to obtain and evaluate all required information before making an award decision.

Formatted: Bullets and Numbering

Deleted: KOs

Deleted: Letter contracts and oral solicitations can expedite the contracting process under negotiation procedures.¶  
a. Letter contracts are preliminary contractual instruments that permit a contractor to begin work immediately. Approvals for use at the HCA level are required. See FAR 16.603; AFARS Manual No. 2, para. 9-2.d(5).¶  
Oral solicitations are permissible when the delay in preparing a written solicitation would be harmful to the government. Use of oral solicitations does not excuse compliance with normal contracting requirements.

Deleted: 4-

Deleted: .

b. Negotiations procedures permit the government to use a “best value” basis for awarding a contract, and pay more to obtain a better product.

c. Offers are solicited by use of a Request for Proposals (RFP) and can allow discussions with offerors before submitting their best and final offer to permit better understanding of needs and capabilities.

Deleted: Request for Quotations (RFQ).

I. Simplified Acquisition Procedures. Simplified Acquisition is used almost exclusively. Neither sealed bidding or contracting by negotiation are needed with the availability of a \$1,000,000 threshold for simplified acquisitions.

Deleted: LOGCAP contract and

Deleted: 5

Deleted:

1. Activities may use simplified acquisition procedures to acquire supplies and services that are not estimated to exceed the simplified acquisition limitation. FAR 13.103(b); All Star Carpet & Bedding, Inc., B-242490.3, Apr. 4, 1991, 91-1 CPD ¶ 352.

a. A simplified acquisition is a procurement of supplies, services, and construction not exceeding the simplified acquisition threshold using simplified acquisition procedures. 41 U.S.C. § 403, FAR 13.003.

Deleted: in the amount of \$100,000 or less

b. Increased thresholds for contingency operations. 41 U.S.C. § 428a. On October 28, 2004, Section 822 of the Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005, Pub. L. No. 108-375, amended 41 U.S.C. § 428a, Special Emergency Procurement Authority, to increase the thresholds for procurements in support of a contingency operation as defined in 10 U.S.C. § 101(a)(13).

Formatted: Font: Bold

Formatted: Font: Not Bold

Deleted: Authority to use simplified acquisition procedures for procurements up to \$250,000 inside the U.S. or \$500,000 outside the U.S

Formatted: Indent: Left: 144 pt, Hanging: 36 pt, No bullets or numbering, Don't adjust space between Latin and Asian text

(1) Simplified Acquisition Threshold. For purchases supporting a contingency operation but made (or awarded and performed) inside the United States, the simplified acquisition threshold is \$250,000. For purchases supporting a contingency operation made (or awarded and performed) outside the United States, the simplified acquisition threshold is \$1,000,000. 41 U.S.C. § 428a(b)(2); FAR 2.101.

Deleted: (1).

Deleted: P

Formatted: Underline

Formatted: Underline

Deleted: 2302

Deleted: (7)

Deleted: DFARS 213.000; FAR 2.101.¶

Deleted: as defined in 10 U.S.C. § 101(a)(13), or to facilitate defense against or recover from NBC or radiological attack the simplified acquisition threshold increases from its normal ceiling of \$100,000 to \$250,000 (inside U.S.) or \$500,000 (outside U.S.) .

Deleted: 1 10

<sup>12</sup> See generally U.S. Dep't of Army, Army Regulation 715-9, Contractors Accompanying the Force (29 Oct. 1999). U.S. Dep't of Army, Pam 715-16, Contractor Deployment Guide (27 Feb. 1998), U.S. Dep't of Army, Army Material Command Pam 715-18, AMC Contracts and Contractors Supporting Military Operations (June 2000), U.S. Dep't of Army, Field Manual 3-100.21, Contractors on the Battlefield (3 Jan. 2003), and U.S. Dep't of Army, Field Manual 100-10-2, Contracting Support on the Battlefield (4 Aug. 1999). See also Memorandum, Acting Secretary of the Air Force, to ALMAJCOM-FOA-DRU/CC, subject: Interim Policy Memorandum—Contractors in the Theater (8 Feb 2001).

(2) Micro-purchase Threshold. For purchases supporting a contingency operation but made (or awarded and performed) inside the United States, the micro-purchase threshold is \$15,000. For purchases supporting a contingency operation made (or awarded and performed) outside the United States, the micro-purchase threshold is \$25,000. 41 U.S.C. § 428a(b)(1); FAR 2.101.

Formatted: Bullets and Numbering

(3) Commercial Items Test Program. For purchases supporting a contingency operation, simplified acquisition methods may be used to purchase commercial item supplies and services up to \$10,000,000. 41 U.S.C. § 428a(c); FAR 13.500(e).

Formatted: Numbered + Level: 1 + Numbering Style: 1, 2, 3, ... + Start at: 2 + Alignment: Left + Aligned at: 144 pt + Tab after: 180 pt + Indent at: 180 pt

2. Choice of method. Contracting officers shall use the simplified acquisition method that is most suitable, efficient, and economical. FAR 13.003.

Deleted: <#>Under the Commercial Items test program, simplified acquisition methods may be used to purchase commercial item supplies and services for amounts greater than the simplified acquisition threshold, but not greater than \$5,000,000. 10 U.S.C. § 2304(g)(1)(B). The program has been extended until January 1, 2006. See Service Acquisition Reform Act of 2003 (included with the National Defense Authorization Act for Fiscal Year 2004), Pub. L. 108-136 § 1443. See also FAR Subpart 13.5.¶

a. Purchase orders. FAR 13.302; DFARS 213.302; AFARS Subpart 5113.302 & 5113.306 (for use of the SF 44).

(1) A purchase order is an offer to buy supplies or services, including construction. Purchase orders usually are issued only after requesting quotations from potential sources. Issuance of an order does not create a binding contract. A contract is formed when the contractor accepts the offer either in writing or by performance. In operational settings, purchase orders may be written using three different forms.

(2) DD Form 1155 or SF 1449. This is a multi-purpose form that can be used as a purchase order, blanket purchase agreement, receiving/inspection report, property voucher, or public voucher. It contains some contract clauses, but users must incorporate all other applicable clauses. FAR 13.307; DFARS 213.307. AFARS Manual No. 2, Appendix J. See clause matrix in FAR Part 52. When used as a purchase order, the KO may make purchases up to the simplified acquisition threshold. Only KOs are authorized to use these forms.

Deleted: Dep't of Defense (

Deleted: )

Deleted: orm

- (3) Standard Form (SF) 44. See Appendices A & B. This is a pocket-sized form intended for over-the-counter or on-the-spot purchases. Clauses are not incorporated. Use this form for “cash and carry” type purchases. Ordering officers, as well as KOs, may use this form. Reserve unit commanders may use the SF 44 for purchases not exceeding the micro-purchase threshold when a Federal Mobilization Order requires unit movement to a Mobilization Station or site, or where procurement support is not readily available from a supporting installation. FAR 13.306, DFARS 213.306, AFARS 5113.306, AFARS Manual No. 2, Appendix G. Conditions for use:
- Deleted: \$2,500
- (a) As limited by appointment letter.
- (b) Away from the contracting activity.
- (c) Goods or services are immediately available.
- (d) One delivery, one payment.
- (4) Ordering officers may use SF 44s for purchases up to the micro-purchase threshold for supplies or services, except that purchases up to the simplified acquisition threshold may be made for aviation fuel or oil. A KO may make purchases up to the simplified acquisition threshold (\$100K normally, or \$1,000,000 if overseas in the theater where the SECDEF has declared a contingency). See DFARS 213.306(a)(1)(B).
- Deleted: \$2,500
- Deleted: KO
- Deleted: 5
- Deleted: K
- b. Government-wide purchase card. Authorized card holders may acquire goods and services up to the micro-purchase threshold. FAR 13.301; DFARS Subpart 213.301, AFARS Subpart 5113.2.
- Deleted:
- Deleted: /micropurchase program
- Deleted: \$2,500

<p>(1) <u>Authorized government purchase card holders, including a KO, may use the cards to purchase goods and services up to the micro-purchase threshold. Even if not in a designated contingency operation, authorized purchase card holders outside the U.S. may make purchases up to \$25,000 for commercial items/services for use outside the U.S., if it is not for work to be performed by workers recruited within the U.S.</u> DFARS 213.301. <u>Cardholders may be authorized to utilize the card as a payment instrument for orders exceeding the micro-purchase threshold made against Federal Supply Schedule contracts, calls written against a Blanket Purchase Agreement (BPA) or orders placed against Indefinite Delivery/Indefinite Quantity (IDIQ) contracts that contain a provision authorizing payment by purchase card. AFARS 5113.202(c) and FAR 13.301(c)(2). A KO may use the card as a method of payment for purchases up to the simplified acquisition threshold when used in conjunction with a simplified acquisition method. Funds must be available to cover the purchases. Special training for cardholders is required. AFARS 5113.202. Issuance of these cards to deploying units must be coordinated prior to deployment, because there is insufficient time to request and receive the cards once the unit receives notice of deployment.</u></p>	<p><b>Deleted:</b> credit</p> <p><b>Deleted:</b> \$2,500 per purchase, or</p> <p><b>Deleted:</b> outside the U.S.</p> <p><b>Inserted:</b> \$2,500 per purchase, or \$25,000 outside the U.S. for commercial items</p> <p><b>Deleted:</b> , but</p> <p><b>Inserted:</b> , but</p> <p><b>Deleted:</b> \$2,500</p> <p><b>Deleted:</b> On 1 November 2001, DOD raised the purchase card limit to \$200,000 for KOs supporting a contingency, humanitarian, or peacekeeping operations. However, AFARS 5113.270 still retains the \$2,500 limitation for most card purchases.</p> <p><b>Inserted:</b> contingency,</p> <p><b>Inserted:</b> , or peacekeeping operations. However, AFARS 5113.270 still retains the \$2,500 limitation for most card purchases. A KO may use the card as a method of payment for purchases up to the simplified acquisition threshold when used in conjunction with a simplified acquisition method. Funds must be available to cover the purchases. Special training for cardholders is required. AFARS</p>
<p>(2) <u>Accommodation Checks/Purchase Card Convenience Checks. Commands involved in a deployment may utilize accommodation checks and/or government purchase card convenience checks in the same manner as they are used during routine operations. Checks should only be used when Electronic Funds Transfer (EFT) or the use of the government purchase card is not possible. See DoD 7000.14-R, vol. 5, ch. 2, para. 0210; see also DFARS 213.270(c)(6) and 213.305-1(3). Government purchase card convenience checks may not be issued for purchases exceeding the micro-purchase threshold. See DoD 7000.14-R, vol. 5, ch. 2, para. 021001.E.1.</u></p>	<p><b>Deleted:</b></p> <p><b>Deleted:</b></p> <p><b>Inserted:</b> purchase threshold of \$2,500. See DoD 7000.14-R, vol. 5, ch. 2, para. 021001.E.</p> <p><b>Deleted:</b> of \$2,500</p> <p><b>Deleted:</b> 1</p> <p><b>Inserted:</b> 1</p>
<p>c. <u>Blanket purchase agreements (BPA). FAR 13.303; DFARS 213.303-5, AFARS 5113.303.</u></p>	<p><b>Formatted:</b> Bullets and Numbering</p>

---

(1) A BPA is a simplified method of filling anticipated repetitive needs for supplies or services essentially by establishing “charge account” relationships with qualified sources of supply. They are not contracts but merely advance agreements for future contractual undertakings. BPAs set prices, establish delivery terms, and provide other clauses so that a new contract is not required for each purchase. The government is not bound to use a particular supplier, as it would be under a requirements contract. KO negotiates firm-fixed-prices for items covered by the BPA, or attaches to the BPA a catalog with pertinent descriptions/prices.

---

(2) KOs may authorize ordering officers and other individuals to place calls (orders) under BPAs. FAR 13.303, AFARS 5113.303-2. Existence of a BPA does not per se justify sole-source acquisitions/procurements. Consider BPAs with multiple sources. If insufficient BPAs exist, solicit additional quotations for some purchases and make awards through separate purchase orders.

---

(3) BPAs are prepared and issued on DD Form 1155 or SF 1449 and must contain certain terms/conditions. FAR 13.303-3:

(A) Description of agreement.

(B) Extent of obligation.

(C) Pricing.

(D) Purchase limitations.

(E) Notice of individuals authorized to purchase under the BPA and dollar limitation by title of position or name.

(F) Delivery ticket requirements.

(G) Invoicing requirements.

d. Imprest funds. FAR 13.305; DFARS 213.305; DOD Reg. 7000.14-R, Financial Mgmt. Reg., vol. 5, Disbursing Policies and Procedures, paras. 020901 to 020908; AR 37-103.

Formatted: Bullets and Numbering

(1) An imprest fund is a cash fund of a fixed amount established by an advance of funds from a finance or disbursing officer to a duly appointed cashier. The cashier disburses funds as needed to pay for certain simplified acquisitions. Funds are advanced without charge to an appropriation, but purchases are made with notation on the receipts returned to the imprest fund cashier of the appropriation, which will be used to reimburse the imprest fund for the amount of the purchase. See DoD 7000.14-R, vol. 5, ch. 2, para. 0209; DFARS 213.305-1. The maximum amount in a fund at any time is \$10,000, but can be increased to \$100,000 during a contingency operation. DoD 7000.14-R, vol. 5, ch. 2, para. 020903. During an overseas contingency operation as defined in 10 U.S.C. 101 (a)(13) or a humanitarian or peacekeeping operation as defined in 10 U.S.C. 2302(8), imprest funds may be used for transactions at or below the micro-purchase threshold, DFARS 213.305-3.

Deleted: (\$2500)

(2) Ordering officers, as well as KOs, may use the imprest fund procedures. Imprest fund cashiers, however, cannot be ordering officers and cannot make purchases using imprest funds. DoD 7000.14-R, vol. 5, ch.2, para. 020905.

(3) Each purchase using imprest funds must be based upon an authorized purchase requisition. If materials or services are deemed acceptable by the receiving activity, the receiver annotates the supplier's sales document and passes it to the imprest fund cashier for payment. Alternatively, the imprest fund cashier may advance cash to an authorized individual to pick up and pay for the material at the vendor's location. See DoD 7000.14-R, vol. 5, ch. 2, para. 020906 B.

Deleted: ¶

3. Competition requirements.

- a. Micro-purchases; Only one oral quotation is required, if the contracting officer finds the price to be fair and reasonable. FAR 13.202; N. Va. Football Officials Assoc., B-231413, Aug. 8, 1988, 88-2 CPD ¶ 120. Such purchases must be distributed equitably among qualified sources. FAR 13.202(a)(1). Grimm's Orthopedic Supply & Repair, B-231578, Sept. 19, 1988, 88-2 CPD ¶ 258. If practical, solicit quotes from other than the previous supplier before placing a repeat order.

**Deleted:** Up to \$2,500 (\$15,000 if supporting a contingency operation) ("micropurchases").

**Deleted:** a quotation shall be solicited

- b. Above micro-purchase threshold up to the simplified acquisition threshold; Contracting Officers shall solicit quotations orally to the maximum extent practicable. FAR 13.106-1; Omni Elevator, B-233450.2, Mar. 7, 1989, 89-1 CPD ¶ 248. Normally soliciting three sources is reasonable. FAR 13.104(b). Do not omit incumbent contractors without good reason. See J. Sledge Janitorial Serv., B-241843, Feb. 27, 1991, 91-1 CPD ¶ 225.

**Deleted:** Over \$2,500 and up

**Deleted:** (\$100K normally, \$500K during declared contingencies).

- c. Do not split requirements aggregating more than the applicable threshold into several purchases merely to permit the use of simplified acquisition procedures. 10 U.S.C. § 2304(g)(2); FAR 13.003.

**Deleted:** Units may not break r

**Deleted:** simplified acquisition dollar limitation

**Deleted:** .

- d. Publication of notices. Subject to the following exceptions, the contracting officer is not required to publicize contract actions that do not exceed the simplified acquisition threshold.

- (1) Public posting of a request for quotations for 10 days is required if the order is estimated to be between \$10,000 and \$25,000, except when ordering perishable subsistence items. 15 U.S.C. § 637(e); 41 U.S.C. § 416; FAR 5.101(a)(2).

- (2) For a CONUS contract action, the contracting officer must publish a synopsis of all contract awards exceeding \$25,000 on the Government-wide point of entry (GPE) at FedBizOpps.gov. 15 U.S.C. § 637(e); FAR 5.101(a)(1).

**Deleted:**

- (3) There is no requirement to publish a synopsis for a defense agency contract that will be made and performed outside the United States, its possessions or Puerto Rico, and for which only local sources will be solicited. FAR 5.202(a)(12).

#### J. Other contracting considerations:



1. Choice of Law/Choice of Forum. When executing contracts overseas, consider using the Choice of Law clause. DFARS 233.215-70 and 252.233-7001.

2. Trade Agreements Act may apply if the contract is for the purchase of a good exceeding \$169,000 or construction exceeding \$6,481,000. See FAR 25.403 and DFARS subpart 225.4

K. Using Existing Contracts to Satisfy Requirements. Existing ordering agreements, indefinite delivery contracts, and requirements contracts may already be available to meet recurring requirements, such as fuel and subsistence items.

Deleted: J

1. Investigate existing contracts with contracting offices of activities with continuing missions in the deployment region. For example, the Navy had an existing contract for the provision of shore services to its ships in the port of Mombassa, Kenya. This contract was used to provide services to aircraft crews during Operation Provide Relief.
2. Determine whether warranty requirements for major end items require the contractor to provide repair and maintenance service in the deployment region.
3. Fuel. The Defense Energy Support Center (DESC) may be able to assist in the procurement of fuels in a contingency operation. More information is available at: <http://www.desc.dla.mil/main/deschome.htm>. The DESC emergency phone number is 1-800-2TOP OFF (1-800-286-7633).

L. Contract Administration, Changes, Quality Assurance, and Terminations. FAR Parts 42, 43, 46, and 49.

Deleted: K

1. Awarding contracts is only half the battle in deployment contracting operations. Contracting personnel must monitor performance closely to ensure the desired goods or services are actually delivered in a timely fashion.

Deleted: AFARS Manual No. 2, para. 9-6.

- a. Requiring units should provide personnel, such as contracting officer's representatives, to assist in monitoring contractor performance to the extent necessary. AFARS Manual No. 2, para. 7-6**b.**

Deleted: c

- b. For larger or more complex requirements, Defense Contract Management Agency has trained inspectors and administrative contracting officers to assist with contract administration. FAR Part 42. More information on DCMA may be found at: <http://home.dcm.mil/>

Deleted: Command

Deleted:

Inserted:

Field Code Changed

Deleted: .

Inserted: .

Deleted:

Deleted: the

Deleted: l

- c. For most contracts, the government relies on the contractor to perform detailed inspections and tests necessary to ensure conformance with contract quality requirements. FAR 46.202-2

2. Under the Changes clause (see, e.g., FAR 52.243-1, Changes-Fixed-Price), the government has authority to require contractors to perform work necessary to achieve the overall purpose of the contract, even if the work actually needed differs somewhat from that specified in the original contract. The contract price is adjusted (a fair increase or decrease in price for the cost of the changed work, plus a reasonable adjustment to profit), if the government directs a change under the Changes clause. See AFARS Manual No. 2, para. 8-14c-e

Deleted: 9-6.e

3. Government terminations.

- a. Termination for Convenience clauses (FAR 52.249-1 through 52.249-6) give the government the right to terminate contracts without cause when doing so is in the government's interest. The contractor recovers its costs plus a reasonable profit on those costs in a convenience termination, but no anticipatory profits.
- b. Termination for Default clauses (see, e.g., FAR 52.249-8, Default (Fixed-Price Supply and Service)) provide the government with the right to terminate a contract for cause.

- (1) The three general bases for default termination are:

- (a) Failure to deliver or perform on time;
- (b) Failure to make progress which endangers performance;  
or
- (c) Failure to perform any other material provision of the contract.

- (2) Contractors may raise defenses to terminations for default (e.g., excusable delay, unreasonable inspections). If a contractor prevails on a defense, then its remedy is normally conversion of the default termination action to a termination for convenience.
- (3) If the government terminates a contract for default successfully, the contractor generally receives payment only for goods actually delivered, and is subject to a later assessment of procurement costs (i.e., the cost of cover).

4. Practical problems in awarding and obtaining performance under government contracts in overseas theaters. AFARS Manual No. 2, paras. 3-3 (oral agreements) and 3-7 (multi-national programs).

Deleted: ,

Deleted: , 9-2.d.(6)

Deleted: L

#### M Alternative Methods for Fulfilling Requirements.

1. LOGCAP Contract. In December 2001, the Army Material Command (OSC) awarded the third iteration of the cost-plus-award-fee LOGCAP (Logistics Civil Augmentation Program) contract to Halliburton KBR Government Operations Division. LOGCAP contract provides for comprehensive logistics and construction support to a deployed force anywhere in the world. Use of this contract to provide logistics support to a deployed force permits a commander to perform a mission with a smaller force than otherwise needed. See AR 700-137, The LOGCAP Homepage (Army AMC) is: <http://www.amc.army.mil/LOGCAP/>.

Deleted: ; see also GAO/NSIAD-97-63, B-272659. Contingency Operations

- a. Civilian contractor.
- b. Provides logistics/engineering services to deployed forces, in such places as Somalia, Haiti, Rwanda, East Timor, and Iraq.
- c. Balkans Support Contract (BSC). In an effort to maintain continuity, the first LOGCAP contractor, Brown & Root Services Corporation (BRSC), continued to provide logistics support for US forces in the Balkan theater of operations through a sole source award. Subsequently, on 19 February 1999 the BSC was competitively awarded to the incumbent BRSC. The BSC is a cost-plus-award-fee IDIQ. All requirements for new or expanded recurring services are staffed for approval through USAREUR DCSLOG.

2. AFCAP. Air Force Contract Augmentation Program. Similar to LOGCAP, AFCAP is primarily a civil engineering support contract, and can also provide limited services. The AFCAP homepage is:  
<https://wwwmil.afcesa.af.mil/Directorate/CEX/CEXX/AFCAP/afcap.html> .

Deleted: . AFCAP

Deleted: d

3. LOGJAMMS contract (Logistics Joint Administrative Management Support Services). It is a task-order driven multiple award contract. This contract is administered by Forces Command (FORSCOM) and is geared to provide support to FORSCOM, U.S. Army Reserve Command, Third Army, and TRADOC, and others upon request. LOGJAMMS is intended to augment existing base support services such as the LOGCAP contract. It provides similar services as the LOGCAP and other Force Sustainment contracts, but focuses more on equipment repair and maintenance support and other logistical support services. Unlike the LOGCAP contract, LOGJAMMS does not provide minor construction support. The LOGJAMSS homepage is:  
<http://www.forscom.army.mil/aacc/LOGJAMSS/default.htm>.

Formatted: Bullets and Numbering

4. Economy Act. 31 U.S.C. § 1535.

- a. Executive agencies may transfer funds to other executive agencies, and obtain goods and services provided from existing stocks or by contract. For example, the Air Force may have construction performed by the Army Corps of Engineers, and the Army may have Department of Energy facilities fabricate special devices.
- b. Procedural requirements for Economy Act orders are set forth in FAR Subpart 17.5, DFARS Subpart 217.5, and DFAS-IN 37-1.
- c. General officer approval is required before placing Economy Act orders outside of DOD. See DFAS-IN 37-1, para. 1207.

Deleted:

5. Acquisition & Cross-Servicing Agreements (ACSA). 10 U.S.C. §§ 2341-2350, DoD Dir. 2010.9, and AR 12-1.

Deleted: Acquisition & Cross-Servicing Agreements (ACSA). 10 U.S.C. §§ 2341-2350, DoD Dir. 2010.9, and AR 12-1. ¶

Formatted: Bullets and Numbering

- a. These authorities permit acquisitions and transfers of specific categories of logistical support to take advantage of existing stocks in the supply systems of the U.S. and allied nations. Transactions may be accomplished notwithstanding certain other statutory rules related to acquisition and arms export controls. The usefulness of these arrangements may be limited when the host nation has not invited U.S. intervention, or when the U.S. deploys forces unilaterally.

- b. Under the statutes, after consulting with the State Department, DoD may enter into agreements with NATO countries, NATO subsidiary bodies, other eligible countries, the UN, and international regional organizations of which the U.S. is a member for the reciprocal provision of logistic support, supplies, and services.
- c. Acquisitions and transfers are on a cash reimbursement or replacement-in-kind or exchange of equal value basis. However, except during periods of active hostilities, reimbursable transactions (i.e., those where repayment in kind is not possible) are limited to a total of \$150M (credit) / \$200M (liability) per year for NATO and \$75M (credit) / \$60M (liability) per year for non-NATO allies.

6. Extraordinary Contractual Actions. Pub. L. No. 85-804; 50 U.S.C. § 1431-35; FAR Part 50.

Deleted: 4

- a. The Secretary of the Army has broad residual powers to initiate extraordinary contractual actions to facilitate national defense.
- b. Procedures for requesting use of these powers are set forth in FAR Subpart 50.4, DFARS Subpart 250.4, and AFARS Subpart 5150.1.

Deleted: M

N. Leases of Real Property. 10 U.S.C. § 2675

- 1. Authority to lease is delegated on an individual lease basis. AR 405-10, para. 3-3b.
- 2. The Corps of Engineers using Contingency Real Estate Support Teams (CREST) negotiates most leases.

3. ~~Billeting services are acquired by contract, not by lease.~~

Deleted: <#>Billeting services are acquired by contract, not by lease.¶

IV. POLICING THE CONTRACT BATTLEFIELD.

- A. Ratification. FAR 1.602-3, AFARS 5101.602-3.

1. Only certain officials (e.g., the chief of a contracting office, Principal Assistant Responsible for Contracting (PARC), or Head of a Contracting Activity (HCA)) may ratify agreements made by unauthorized persons.

1. There are dollar limits to the authority to ratify unauthorized commitments. AFARS 5101.602-3(b). The three approval levels are:

← - - - Formatted: Bullets and Numbering

- a. \$10,000 or less -- Chief of Contracting Office.
  - b. \$100,000 or less -- PARC.
  - c. Greater than \$100,000 -- HCA.
3. A ratifying official may ratify only when:
    - a. The government has received the goods or services.
    - b. The ratifying official has authority to obligate the United States now, and could have obligated the United States at the time of the unauthorized commitment.
    - c. The resulting contract would otherwise be proper, i.e., adequate funds are available, the contract is not prohibited by law, etc.
    - d. The price is fair and reasonable.

B. Extraordinary Contractual Actions. FAR Part 50.

1. If ratification is not appropriate (e.g., no price agreement with supplier), informal commitment procedures may allow compensation. FAR 50.302-3.
2. Requests to formalize informal commitments must be based on a request for payment made within six months of furnishing the goods or services; also, normal contracting procedures must have been impracticable at the time of the commitment to use extraordinary procedures. FAR 50.203(d).

3. These procedures have been used to reimburse owners of property taken during the Korean War (AFCAB 188, 2 ECR ¶ 16 (1966)); in the Dominican Republic (Elias Then, Dep't of Army Memorandum, 4 Aug. 1966); Jaragua S.A., ACAB No. 1087, 10 Apr. 1968; and in Panama (Office of the Gen. Counsel, Dep't of Army Memorandum, Jan. 1990).

C. Government Accountability Office (GAO) Claims.

1. The GAO has broad authority to settle claims against the United States. 31 U.S.C. § 3702(a); Claim of Hai Tha Trung, B-215118, 64 Comp. Gen. 155 (1984). The procedures are set forth in 4 C.F.R. Part 30 and in GAO Policies and Procedures Manual for the Guidance of Federal Agencies, Title 4. *See also* DFAS-IN 37-1, para. 090902.
2. Voluntary Creditors. Generally, government employees who make payments from private funds on behalf of the U.S. may not be reimbursed. *See* 31 U.S.C. § 1342; *see also* Voluntary Payments-Gov't Reimbursement Liability, B-115761, 33 Comp. Gen. 20 (1953). A limited exception to this rule applies to urgent, unforeseen emergencies. Reimbursement of Personal Expenditures by Military Member for Authorized Purchases, B-195002, May 27, 1980, 80-2 CPD ¶ 242. Circumstances authorizing reimbursement include protection of government property; Meals-Furnishing-Gen. Rule, B-177900, 53 Comp. Gen. 71 (1973); and, unforeseen impediments to completion of an urgent agency mission; Reimbursement of Personal Expenditures by Military Member for Authorized Purchases, *supra*.
3. If the GAO believes that it cannot pay a meritorious claim because an appropriation is not available for its payment, GAO reports to Congress. 31 U.S.C. § 3702(d). This report may form the basis for congressional private relief legislation.

D. Claims Under the Contract Disputes Act. FAR Subpart 33.2.

1. The Contract Disputes Act (CDA), 41 U.S.C. §§ 601-13, provides a statutory framework for resolution of claims arising under, or relating to, a government contract.

2. General procedures under the CDA.

- a. Contractor or the government asserts a claim, which the contracting officer reviews and evaluates for a decision;
- b. The contracting officer renders a final decision on the claim; and
- c. The contractor may appeal the final decision to either the U.S. Court of Federal Claims or the agency board of contract appeals.

d. Claims for losses due to combat action must arise under the contract to be compensable. T&G Aviation, Inc., ASBCA No. 40428, 01-1 BCA ¶ 31,147.

- E. Redeployment. Ensure payments are finalized and recorded before redeployment. Coordinate for transfer of files to parent contracting organization for holding and resolution of issues that arise after redeployment.

**V. INTERNATIONAL LAW CONSIDERATIONS IN THE ACQUISITION OF SUPPLIES AND SERVICES DURING MILITARY OPERATIONS.**

- A. U.S. Rights and Obligations Under International Law Relating to Battlefield Procurement of Goods. The law of land warfare regulates the taking and use of property by military forces. The rights and obligations of military forces vary depending on the ownership of the property, the type of property, and whether the taking occurs on the battlefield or under military occupation. Certain categories of property are completely protected from military action.

Deleted: ¶

**B. Acquisition of Enemy Property in Combat.**

- 1. Confiscation. The permanent taking or destruction of enemy public property found on the battlefield. HR (Hague Convention Annex Reg.), art. 23, para. (g); HR, art. 53; Field Manual 27-10, Law of Land Warfare, para. 59, 393-424 (July 1956) (hereinafter FM 27-10).



- a. Confiscation is a taking without compensation to the owner. Thus, a commander may acquire the supplies of an enemy armed force and its government. Public buildings also may be used for military purposes.
  - b. If ownership is not known, a commander may treat property as public property until ownership is determined. FM 27-10, para. 394. Privately-owned military equipment, i.e., weapons, radios, etc., may be treated as public property and taken without compensation. HR, art. 53; FM 27-10, para. 403.
2. Seizure. The temporary taking of private property. When the use of private real property on the battlefield is required by military necessity, military forces may temporarily use it without compensation. For example, a deployed force might seize civilian construction equipment to augment its organic capability to dig into fighting positions. Private personal property, if taken, must be returned when no longer required, or the user must compensate the owner. HR, art. 53; FM 27-10, para. 406.

C. Acquisition of Enemy Property in Occupied Territories.

1. An occupation is the control of territory by an invading army. HR, art. 42; FM 27-10, para. 351. If a lawful government invites U.S. forces, the territory is not occupied, and U.S. forces have no right to take property.
2. Public personal property that has some military use may be confiscated without compensation. FM 27-10, para. 403.
3. The occupying military force may use public real property. FM 27-10, para. 401.
4. Private property capable of direct military use may be seized and used in the war effort. Users must compensate the owner at the end of the war. FM 27-10, para. 403.
5. Requisition. The taking of private property needed to support an occupying military force is known as requisition. Users must compensate owners as soon as possible. FM 27-10, para. 417. The command may levy the occupied populace to support its force, i.e., pay for the requisition.

Deleted: 4

- D. U.S. Rights and Obligations Under International Law Relating to Battlefield Procurement of Services. The law of land warfare also regulates the use of prisoners of war and the local populace as a source of services for military forces. Prisoners of war and civilians may not be compelled to perform services of a military character or purpose.
- E. Use of Prisoners of War as a Source for Services During War.
1. Prisoners of war may be used as a source of labor; however, the work which prisoners of war may perform is very limited. Geneva Convention for the Protection of Prisoners of War (GPW), art. 49; FM 27-10, para. 125-133.
  2. Prisoners of war may not be used as source of labor for work of a military character or purpose. GPW, art. 49; FM 27-10, para. 126.
- F. Use of Civilian Persons as a Source for Services during War.
1. Commanders may not compel civilian persons to work unless they are over eighteen years of age, and then only on work necessary for the needs of the army of occupation, for public utility services, or for the feeding, sheltering, clothing, transportation, or health of the population of the occupied area. Geneva Convention Relative to Protection of Civilian Persons in Time of War (GC), art. 51; FM 27-10, para. 418-424.
  2. Protected persons may not be compelled to take part in military operations against their own country. GC, art. 51; FM 27-10, para. 418.
  3. The prohibition against forced labor in military operations precludes requisitioning the services of civilian persons upon work directly promoting the ends of war, such as construction of fortifications, entrenchments, and military airfields or transportation of supplies or ammunition in the zone of operations. There is no prohibition against their being employed voluntarily and paid for this work. FM 27-10, para. 420.
- G. Practical Considerations Concerning the Use of International Law Principles for Acquisition of Supplies and Services.

1. The uncertainty of these principles (confiscation, seizure, and requisition) to provide reliable sources for the acquisition of supplies and services makes them of little use except in emergency situations.
2. The impact that taking of private property or forced labor inevitably has on the populace may be detrimental to mission accomplishment.
3. The difficulty in accurately computing compensation owed without accurate records may lead to extensive claims work during the latter stages of an operation.
4. Providing speedy compensation under U.S. law is difficult.

Deleted: The p

## VI. CONTRACTORS ON THE BATTLEFIELD.

- A. Civilian contractors may be employed in an Area of Operations (AO) to support U.S. Army force structures and/or weapon systems.<sup>2</sup>
- B. Three categories of contractors can be used in a deployed environment: theater support contractors,<sup>3</sup> external support contractors,<sup>4</sup> and systems contractors.<sup>5</sup> Utilization of each category of contractor must be considered in operational planning.
- C. Contractor status in foreign country. Contractors may have status defined by an agreement (SOFA or SOMA) or may have no official status.

---

3 U.S. DEP'T OF ARMY, FIELD MANUAL 3-100.21, CONTRACTORS ON THE BATTLEFIELD, para. 2-15 (3 Jan. 2003); THE JOINT CHIEFS OF STAFF, JOINT PUB. 4.0, DOCTRINE FOR LOGISTIC SUPPORT OF JOINT OPERATIONS V-1 TO V-3 (6 Apr. 2000) [hereinafter JOINT PUB 4.0]. Theater support contractors support deployed forces through preexisting contracts or contracts awarded from the theater of operations. They provide goods, services and minor construction, usually from the local vendor base, to meet the immediate needs of operational commanders. FM 100-10-2 at 2-15.

4 FM 100-10-2 at 2-15; JOINT PUB. 4.0 at V-1 to V-3. External support contractors provide support separate from theater support or systems contractors. External support contractors may be distinguished from the other types in that the contracting officers who award the contracts retain distinct authority separate from the theater PARC or systems offices. An example of this type of contract is the LOGCAP contract. FM 100-10-2, at 2-15.

5 FM 100-10-2 at 2-15; JOINT PUB. 4.0 at V-1 to V-3. Systems contractors provide support, during peacetime and conflict, for a particular end item or system such as a weapon system. These contractors commonly provided life cycle management for the systems they produce. Examples include support for vehicles, weapon systems and aircraft. FM 100-10-2 at 2-15.

Deleted: 4-

Deleted: .

Deleted: 4-

Deleted: .

Deleted: 4-

Deleted: .

Deleted: 4-

Deleted: .

Deleted: 4-

D. Discipline.

1. Discipline is the responsibility of the Contractor. However, the KO must ensure all necessary standards (GO #1, theater directives, policies, etc.) are incorporated into the contract.
2. Criminal Jurisdiction is controlled by The Military Extraterritorial Jurisdiction Act of 2000, 18 U.S.C. §§ 3261-67. The Commander must use the KO to exercise control over the actions of the contractor in non-criminal areas. For an excellent overview of the MEJA and implications on contractor activities, including draft contract language, see, Major Joseph R. Perlak, The Military Extraterritorial Justice Act of 2000: Implications for Contractor Personnel, 169 Mil. L. R. 92 (2001).
3. The commander can utilize administrative sanctions (suspension of exchange or MWR privileges) or can effect the removal of a contractor employee (pursuant to the contract and with the KO's authority.)

E. Compensation: (Insurance for contractor employees).

1. Several programs are available to ensure "workers comp" type insurance programs cover contractor employees while deployed and working on USG contracts. See generally, FAR 28.305.

- a. Defense Base Act (DBA) 42 USC §§ 1651-54, FAR 28.309 and 52.228-3; DFARS 228.305 and 228.370(a). See, Royal Indem. Co. v. Puerto Rico Cement Co., 142 F.2d 237, 239 (1st Cir. 1944), cert. denied, 323 U.S. 756 (1944) (holding that a construction employee working on a military base in Puerto Rico was covered by the DBA because the purpose of the DBA was to extend the benefits of the LHWCA to areas overseas and to obtain insurance at reasonable rates); Berven v. Fluor Co., 171 F. Supp. 89 (S.D.N.Y. 1959) (explaining that the statute covers individuals employed at any military, air, or naval base or contracts for the purpose of engaging in a public work); See also, University of Rochester v. Hartman, 618 F.2d 170, 173 (2d Cir. 1980) (holding that a service contract lacking a nexus with overseas construction project or work connected with national defense does not constitute “public work” within the meaning of 42 U.S.C. § 1651(a)(4)); O’Keeffe v. Pan American World Airways Inc., 338 F.2d 319 (5th Cir. 1964), cert. denied, 380 U.S. 951 (1965) (holding that the frolic and detour rule for scope of employment analysis must be applied more broadly in the context of DBA claims because the statute was intended to avoid harsh results); Republic Aviation Co. v. Lowe, 164 F.2d 18 (2d Cir. 1947), cert. denied, 333 U.S. 845 (1948)
- b. Longshore and Harbor Worker’s Compensation 33 USC §§ 901-950, DA PAM. 715-16, para. 10-5c to 10-5d. Applicable by operation of the DBA.
- c. War Hazards Compensation Act (WHCA) 42 USC §§ 1701-17, FAR 52.228-4, DFARS 228.370(a). Huskisson v. Hawaiian Dredging Co., 212 F.2d 219, 220-21 (7th Cir. 1954); T&G Aviation, Inc., ASBCA No. 40428, 01-1 BCA ¶ 31,147 (ASBCA, 2000).
- d. Federal Tort Claims Act (FTCA) 28 USC §§ 1346, 2671-80, may provide an avenue for recovery.)

Deleted: Defense

Deleted: B

Deleted: .

Deleted:

Deleted: M

2. Capture & Detention. DA Pam 715-19, para. 11-1; DFARS 252.228-7003. Provides for government reimbursement for wages/salary paid to a detained, captured, or missing.

#### F. Work Hours.

1. The KO must consider the work hours/duty day for a given contractor in a deployed setting.

2. DFARS 252.222-7002 requires contractors to comply with local laws, regulations, and labor union agreements governing work hours.
3. The “Eight-Hour Law” (40 USC §§ 321-26) does not apply to overseas locations. FAR 22.103.1 allows for longer workweeks if such a workweek is established by local custom, tradition, or law.
4. SOFAs or other status agreements may impact workhours/workweek issues.

#### H. Continued Performance During a Crisis.

1. Commanders are rightly concerned about the continuation of contractor support in the face of combat/hostile operations.
2. U.S. DEP’T OF DEFENSE, INSTRUCTION 3020.37, CONTINUATION OF ESSENTIAL DOD CONTRACTOR SERVICES DURING A CRISIS (6 Nov. 1990) (administrative reissuance incorporating Change 1, 26 Jan. 1996). The Instruction requires contractors to use all means available to continue to provide services deemed essential by DOD. The DODI is guidance for commanders; it does not bind contractors in any way.
3. There is no “desertion” offense for contractor personnel. Commanders should plan for interruptions in services, if the contractor appears to be unable to continue support.
4. Anecdotally, this has not been a problem.

#### I. Security/Force Protection.

1. Security for contractor personnel continues to cause concerns.
2. Doctrinally, DOS has the responsibility to protect non-DOD US citizens in the host nation/country of operations.
3. Contractors have responsibility to provide force protection and counter-terrorism awareness training to their employees similar to that provided to US Government employees. DFARS 225.74 and 252.225-7043

4. Contractor personnel may be armed for self-defense purposes. Contractor personnel generally cannot be required to accept weapons.

Deleted: 3

5. Arming contractors presents a host of status & other international law questions for the advising contract attorney.

Deleted: 4

## VII. CONCLUSION.

- A. Identification and Proper Training of Contracting Personnel.
- B. Contract Funding and Methods of Acquisition: every deploying attorney should know the basics.
- C. Ratifications and Unauthorized Commitments.

## ATTACHMENT A

### INSTRUCTIONS FOR THE USE OF THE SF 44:

**Instructions are located on the inside cover of the form booklet.**

#### 1. Filling out the Form

- (a) All copies of the form must be legible. To insure legibility, indelible pencil or ball-point pen should be used. SELLER'S NAME AND ADDRESS MUST BE PRINTED.
- (b) Items ordered will be individually listed. General descriptions such as "hardware" are not acceptable. Show discount terms.
- (c) Enter project reference or other identifying description in the space captioned "PURPOSE." Also, enter proper accounting information, if known.

#### 2. Distributing Copies

**Copy No. 1 (Seller's Invoice)**- Give to seller for use as the invoice or as an attachment to his commercial invoice.

**Copy No. 2 (Seller's Copy of the Order)**- Give to seller for use as a record of the order.

**Copy No. 3 (Receiving Report-Accounting Copy)**-

- (1) On over-the-counter transactions where the delivery has been made, complete receiving report section and forward this copy to the proper administrative office.
- (2) On other than over-the-counter transactions, forward this copy to location specified for delivery. (Upon delivery, receiving report section is to be completed and this copy then forwarded to the proper administrative office.

**Copy No. 4 (Memorandum Copy)**- Retain in the book, unless otherwise instructed.

#### 3. When Paying Cash at Time of Purchase

- (a) Enter the amount of cash paid and obtain seller's signature in the space provided in the seller section of Copy No. 1. If seller prefers to provide a commercial cash receipt, attach it to Copy No. 1 and check the "paid in cash" block at the bottom of the form.
- (b) Distribution of copies when payment is by cash is the same as described above, except that Copy No.1 is retained by Government representative when cash payment is made. Copy No. 1 is used thereafter in accordance with agency instruction pertaining to handling receipts for cash payments.



**TOP HALF**

RAYMOND

SF 44

BOTTOM HALF

ORDERED BY (Signature and title)	
PURPOSE AND ACCOUNTING DATA	
<b>PURCHASER—</b> To sign below for over-the-counter delivery of items	
RECEIVED BY	
TITLE	DATE
<b>SELLER—</b> Please read instructions on Copy 2	
<input type="checkbox"/> PAYMENT RECEIVED \$	<input type="checkbox"/> PAYMENT REQUESTED \$
NO FURTHER INVOICE NEED BE SUBMITTED	
SELLER	DATE
BY (Signature)	
I certify that this account is correct and proper for payment in the amount of \$	DIFFERENCES
	ACCOUNT VERIFIED: CORRECT FOR
(Authorized certifying officer)	BY
PAID BY <input type="checkbox"/> CASH	DATE PAID
OR (Check No.)	VOUCHER NO.
* PLEASE INCLUDE ZIP CODE	
1. SELLER'S INVOICE (See Instructions on Copy 2)	
STANDARD FORM 44a (Rev. 10-83) PRESCRIBED BY GSA FAR (48 CFR) 53.213(c)	

## **CHAPTER 18**

### **CONTRACT TERMINATIONS FOR CONVENIENCE**

I. INTRODUCTION.....	1
II. THE RIGHT TO TERMINATE FOR CONVENIENCE. ....	2
A. Termination is for the convenience of the government. ....	2
B. Termination for Convenience Clauses.....	2
C. The “Christian Doctrine.” .....	4
D. Convenience Terminations Imposed by Law. ....	5
III. THE DECISION TO TERMINATE FOR CONVENIENCE. ....	7
A. Regulatory Guidance. ....	7
B. Standard of Review.....	9
C. Revocation of a Termination for Convenience.....	13
IV. CONVENIENCE TERMINATION SETTLEMENTS. ....	13
A. Procedures. FAR Part 49.....	13
B. Amount of Settlement. ....	14
C. Special Considerations.....	19
D. Limitations on Termination for Convenience Settlements. ....	21
E. Commercial Items – Termination For Convenience.....	21
F. Fiscal Considerations .....	22
V. CONCLUSION.....	25



## **CHAPTER 18**

### **CONTRACT TERMINATIONS FOR CONVENIENCE**

#### **I. INTRODUCTION.**

##### **A. References and Definition.**

1. FAR Part 49.
2. FAR 52.249-1 through 52.249-7.
3. Definition: "Termination for convenience" means the exercise of the Government's right to completely or partially terminate performance of work under a contract when it is in the Government's interest. FAR 2.101.

##### **B. Historical Development. See Krygoski Constr. Co., Inc. v. United States, 94 F.3d 1537 (Fed. Cir. 1996) (court traces history of government's right to terminate contracts for convenience).**

##### **1. Inherent Authority.**

- a. The government has inherent authority to suspend contracts. United States v. Corliss Steam Engine Co., 91 U.S. 321 (1875).
- b. A contractor can recover breach of contract damages, which include anticipatory (lost) profits, as a result of a termination based on inherent authority. United States v. Speed, 75 U.S. 77 (1868).

##### **2. Statutory and Regulatory Authority.**

- a. Terminations for the government's convenience developed as a tool to avoid enormous procurements upon completion of a war

MAJ Michael Norris  
54th Graduate Course  
Fall 2005

effort. See Dent Act, 40 Stat. 1272 (1919); Contract Settlement Act of 1944, 58 Stat. 649.

- b. Settlement of war related contracts led to the federal procurement policy that the parties to a federal contract must bilaterally agree that the government can terminate a contract for convenience.
- c. Convenience termination clauses preclude the contractor from recovering anticipatory or lost profits when the government in good faith terminates the contract for its convenience.

## **II. THE RIGHT TO TERMINATE FOR CONVENIENCE.**

- A. Termination is for the convenience of the government. When a contractor is performing at a loss, termination may be beneficial to the contractor, but the government has no duty to the contractor to exercise the government's right to terminate for the contractor's benefit. Contact Int'l Corp., ASBCA No. 44636, 95-2 BCA ¶ 27,887; Rotair Indus., ASBCA No. 27571, 84-2 BCA ¶ 17,417.
- B. Termination for Convenience Clauses. FAR 52.249-1 through 52.249-7.
  - 1. The FAR provides various termination for convenience clauses. The proper clause for a specific contract is dependent upon the type and dollar amount of the contract. See FAR Subpart 49.5.
    - a. Contracts for commercial items and simplified acquisitions for other than commercial items include unique convenience termination provisions that, for the most part, are not covered by Subpart 49.5. See 52.212-4 and 52.213-4.
    - b. "Short form" clauses govern fixed-price contracts not to exceed \$100,000. Settlement is governed by FAR Part 49. See Arrow, Inc., ASBCA No. 41330, 94-1 BCA ¶ 26,353 (board denied claim for useful value of special machinery and equipment because service contract properly contained short form termination clause).

- c. Fixed-price contract “long form” clauses (contracts exceeding \$100,000). These clauses specify contractor obligations and termination settlement provisions.
  - d. Cost reimbursement contract clauses. These clauses cover both convenience and default terminations, and specify detailed termination settlement provisions. See FAR 52.249-6.
- 2. The clauses give the government a right to terminate a contract, in whole or in part, when in the government's interest.
- 3. The clauses also provide the contractor with a monetary remedy.
  - a. The contractor is entitled to:
    - (1) the contract price for completed supplies or services accepted by the government;
    - (2) reasonable costs incurred in the performance of the work terminated, to include a fair and reasonable profit (unless the contractor would have sustained a loss on the contract if the entire contract had been completed); and
    - (3) reasonable costs of settlement of the work terminated. See FAR 52.249-2(g).
  - b. The cost principles of FAR Part 31 in effect on the date of the contract shall govern the claimed costs.
  - c. Exclusive of settlement costs, the contractor's recovery may not exceed the total contract price.
  - d. The contractor cannot recover anticipated (lost) profits or consequential damages, which would be recoverable under common law breach of contract principles. FAR 49.202(a).

- C. The “Christian Doctrine.” A mandatory contract clause that expresses a significant or deeply ingrained strand of public procurement policy is considered to be included in a contract by operation of law. G.L. Christian & Assoc. v. United States, 312 F.2d 418 (Ct. Cl. 1963) (termination for convenience clause read into the contract by operation of law).
1. The Christian doctrine does not turn on whether clause was intentionally or inadvertently omitted, but on whether procurement policies are being avoided or evaded, deliberately or negligently, by lesser officials. S.J. Amoroso Constr. Co. v. United States, 12 F.3d 1072 (Fed. Cir. 1993) (Buy American Act (BAA) clause for construction contract read into contract after it had been stricken and erroneously replaced by the BAA supply clause).
  2. The Christian doctrine applies only to mandatory clauses reflecting significant public procurement policies. Michael Grinberg, DOT BCA No. 1543, 87-1 BCA ¶ 19,573 (board refused to incorporate by operation of law a discretionary T4C clause).
  3. The Christian doctrine does not apply when the contract includes an authorized deviation from the standard termination for convenience clause. Montana Refining Co., ASBCA No. 44250, 94-2 BCA ¶ 26,656 (ID/IQ contract with a stated minimum quantity included deviation in T4C clause that agency would not be liable for unordered quantities of fuel "unless otherwise stated in the contract").
  4. When a contract lacks a termination clause, an agency can’t limit termination settlement costs by arguing that the Short Form termination clause applies. Empres de Viacao Terceirenses, ASBCA No. 49827, 00-1 BCA ¶ 30,796 (ASBCA noted that use of the Short Form clause was predicated on a contracting officer’s determination and exercise of discretion, which was lacking in this case).
  5. Impact of other Termination Clauses: Existence of “Termination on Notice” clause in contract modification, did not render Termination for Convenience clause meaningless. Dart Advantage Warehousing, Inc. v. United States, 52 Fed. Cl. 694 (2002) (clause with such ancient lineage, reflecting deeply ingrained public procurement policy, and applied to contracts with the force and effect of law even when omitted, should not be materially modified or summarily rendered meaningless without good cause).



D. Convenience Terminations Imposed by Law.

1. Termination by Conversion.

- a. The termination for default clauses provide that an erroneous default termination converts to a termination for convenience. FAR 52.249-8(g); FAR 52.249-10(c).
- b. However, if the government acted in bad faith while terminating a contract for default, courts and boards will award common law breach damages rather than the usual termination for convenience costs. See Apex Int'l Mgmt. Servs., Inc., ASBCA No. 38087, 94-2 BCA ¶ 26,842 (finding 20 breaches, ASBCA holds Navy liable for breach damages).

2. Constructive Termination for Convenience.

- a. A government directive to end performance of work will not be considered a breach but rather a convenience termination if the action could lawfully fall under that clause, even if the government mistakenly thinks a contract invalid, erroneously thinks the contract can be terminated on other grounds, or wrongly calls a directive to stop work a "cancellation." G.C. Casebolt Co. v. United States, 421 F.2d 710 (Ct. Cl. 1970); John Reiner & Co. v. United States, 325 F.2d 438 (Ct. Cl. 1963).
- b. The constructive termination for convenience doctrine is based on the concept that a contracting party who is sued for breach may ordinarily defend on the ground that there existed at the time of the breach a legal excuse for nonperformance, although that party was then ignorant of the fact. College Point Boat Corp. v. United States, 267 U.S. 12 (1925).

- c. However, the government cannot use the constructive termination for convenience theory to retroactively terminate a fully performed contract in an effort to limit its liability for failing to order the contract's minimum amount of goods or services. Ace-Federal Reporting, Inc., v. Barram, 226 F.3d 1329 (Fed. Cir. 2000); Maxima Corp. v. United States, 847 F.2d 1549 (Fed. Cir. 1988); PHP Healthcare Corp., ASBCA No. 39207, 91-1 BCA ¶ 23,647.
- d. Further, the government may not require bidders to agree in advance that the government's failure to order the contract's minimum quantity will be treated as a termination for convenience. Southwest Lab. of Okla., Inc., B-251778, May 5, 1993, 93-1 CPD ¶ 368.

### 3. Deductive Change versus Partial Termination for Convenience.

- a. The contracting officer must determine whether deleted work is a deductive change or a termination for convenience.
- b. This distinction is important because it determines whether the measure of the contractor's recovery is under the contract's changes clause or the termination for convenience clause.
- c. Generally, the courts and boards will not overturn the contracting officer's determination that the deleted work is a deductive change if the parties consistently treated the deletion as such. Dollar Roofing, ASBCA No. 36461, 92-1 BCA ¶ 24,695. But see Griffin Servs., Inc., GSBCA No. 11022, 92-3 BCA ¶ 25,181 (board characterized deleted work as a partial termination for convenience, but ordered recovery based on the changes clause).
- d. If the contractor disputes the contracting officer's treatment of the deletion, courts and boards will examine the relative significance of the deleted work.
  - (1) If major portions of the work are deleted and no additional work is substituted in its place, the termination for convenience clause must be used. Nager Elec. Co. v. United States, 442 F.2d 936 (Ct. Cl. 1971).

- (2) Courts and boards will treat the deletion of relatively minor and segregable items of work as a deductive change.  
Lionsgate Corp., ENG BCA No. 5425, 90-2 BCA ¶ 22,730.

### III. THE DECISION TO TERMINATE FOR CONVENIENCE.

#### A. Regulatory Guidance.

1. The FAR clauses give the government the right to terminate a contract in whole or in part if the contracting officer determines that termination is in the government's interest. See John Massman Contracting Co. v. United States, 23 Cl. Ct. 24 (1991) (no duty to terminate when it would be in the contractor's best interest).
2. The FAR provides no guidance on factors that the contracting officer should consider when determining whether termination is "in the government's interest." FAR 49.101(b) and the convenience termination clauses merely provide that contracting officers shall terminate contracts only when it is in the government's interest to do so.
3. The right to terminate "comprehends termination in a host of variable and unspecified situations" and is not limited to situations where there is a "decrease in the need for the item purchased." John Reiner & Co. v. United States, 325 F.2d 438 (Ct. Cl. 1963), cert. denied, 377 U.S. 931 (1964).
4. A "cardinal change" in the government's requirements is not a prerequisite to a termination for convenience. T&M Distributors, Inc. v. United States, 185 F.3d 1279 (Fed. Cir. 1999).
5. The FAR does provide guidance concerning circumstances in which contracting officers normally **cannot or should not** use a convenience termination. For example, a negotiated no-cost settlement is appropriate instead of a termination for convenience or default when
  - a. The contractor will accept it;
  - b. Government property was not furnished; and,

- c. There are no outstanding payments due to the contractor, debts due by the contractor to the government, or other contractor obligations. FAR 49.101(b).
- 6. The government normally should not terminate a contract, but should allow it to run to completion, when the price of the undelivered balance of the contract is less than \$5,000. FAR 49.101(c).
- 7. There is no requirement to give the contractor a hearing before the termination decision. Melvin R. Kessler, PSBCA No. 2820, 92-2 BCA ¶ 24,857.
- 8. Notice of termination. When terminating a contract for convenience, the termination contracting officer (TCO) must provide notice to the contractor, the contract administration office, and any known assignee, guarantor, or surety of the contractor. Notice shall be made by certified mail or hand delivery. FAR 49.102.
- 9. Contractor duties after receipt of notice of termination. FAR 49.104. The contractor is required generally to:
  - a. Stop work immediately and stop placing subcontracts;
  - b. Terminate all subcontracts;
  - c. Immediately advise the TCO of any special circumstances precluding work stoppage;
  - d. Perform any continued portion of the contract and submit promptly any request for equitable adjustment to the price;
  - e. Protect and preserve property in the contractor's possession;
  - f. Notify TCO in writing concerning any legal proceedings growing out of any subcontract or other commitment related to the terminated portion of the contract;

- g. Settle subcontract proposals;
- h. Promptly submit own termination settlement proposal; and
- i. Dispose of termination inventory as directed or authorized by TCO.

10. Duties of TCO after notice of termination. FAR 49.105.

- a. Direct the action required of the prime contractor;
- b. Examine the contractor's settlement proposal (and when appropriate, the settlement proposals of subcontractors);
- c. Promptly negotiate settlement agreement (or settle by determination for the elements that cannot be agreed upon, if unable to negotiate a complete settlement).

B. Standard of Review.

- 1. The courts and boards recognize the government's broad right to terminate a contract for convenience. It is not the province of the courts to decide de novo whether termination of the contract was the best course of action. Salsbury Indus. v. United States, 905 F.2d 1518 (Fed. Cir. 1990).
- 2. The "Kalvar" test. To find that a termination for convenience in legal effect is a breach of contract, a contractor must prove bad faith or clear abuse of discretion. This is sometimes referred to as the "Kalvar" test. Salsbury Indus. v. United States, 905 F.2d 1518 (Fed. Cir. 1990); Kalvar Corp., Inc., v. United States, 543 F.2d 1298 (Ct. Cl. 1976); TLT Constr. Corp., ASBCA No. 40501, 93-3 BCA ¶ 25,978 (inept government actions do not constitute bad faith); Northrop Grumman Corp. v. United States, 46 Fed. Cl. 622 (2000).<sup>1</sup>

---

<sup>1</sup>The court applied the tests for finding a termination improper that were suggested by the Federal Circuit in Krygoski Construction Company, Inc. v. United States, 94 F.3d 1537 (Fed. Cir. 1996). The court found that the

a. Bad faith.

- (1) Boards and courts presume that contracting officers act conscientiously in the discharge of their duties. Krygoski Construction Company, Inc. v. United States, 94 F.3d 1537 (Fed. Cir. 1996).
- (2) To succeed on this theory, a contractor must show through "well nigh-irrefragable proof," tantamount to evidence of some specific intent to injure the contractor, that the contracting officer acted in bad faith. Kalvar Corp., Inc., v. United States, 543 F.2d 1298 (Ct. Cl. 1976). A recent example of bad faith is found in Bill Hubbard v. United States, 52 Fed. Cl. 192 (2002) (It was "clear to the court that the stated reasons for [moving the plaintiff's office location] were pretextual, and that the move was engineered in bad faith, without regard, indeed, with deliberate and bad faith disregard, for the legitimate business interests" of the plaintiff).
- (3) Standard of Proof: Overcoming the presumption that the government acts in good faith requires "clear and convincing" evidence. Am-Pro Protective Services, Inc. v. United States, 281 F.3d 1234 (Fed. Cir. 2002) (Protestor's "belated assertions, with no corroborating evidence, therefore fall short of the clear and convincing or highly probable (formerly described as well-nigh irrefragable) threshold.").

---

National Aeronautics and Space Administration (NASA) did not terminate Northrop's Space Station contract "simply to acquire a better bargain from another source," nor did NASA enter its contract with Northrop with no intent of fulfilling its promises.

b. Abuse of discretion.

- (1) A contracting officer's decision to terminate for convenience cannot be arbitrary or capricious.
- (2) The Court of Claims (predecessor to the Court of Appeals for the Federal Circuit) cited four factors to apply in determining whether a contracting officer's discretionary decision is arbitrary or capricious. Keco Indus. v. United States, 492 F.2d 1200 (Ct. Cl. 1974). These factors are:
  - (a) Evidence of subjective bad faith on the part of the government official;
  - (b) Lack of a reasonable basis for the decision;
  - (c) The amount of discretion given to the government official; *i.e.*, the greater the discretion granted, the more difficult it is to prove that the decision was arbitrary and capricious; and,
  - (d) A proven violation of an applicable statute or regulation (this factor alone may be enough to show that the conduct was arbitrary and capricious).

3. The Torncello "change in circumstances" test.

- a. In 1982, a plurality of the Court of Claims articulated a different test for the sufficiency of a convenience termination. The test is known as the "change in circumstances" test. Torncello v. United States, 681 F.2d 756 (Ct. Cl. 1982) (T4C clause could not be used to avoid paying anticipated profits unless there was some change in circumstances between time of award and termination). Critics of the "change in circumstances" test charged that the court should have applied the "Kalvar" test.

- b. The Court of Appeals for the Federal Circuit subsequently characterized Torncello as a "bad faith" case. Salsbury Indus. v. United States, 905 F.2d 1518 (Fed. Cir. 1990) ("[Torncello] stands for the unremarkable proposition that when the government contracts with a party knowing full well that it will not honor the contract, it cannot avoid a breach claim by advertent to the convenience termination clause.") This rationale had been applied by the ASBCA prior to the Federal Circuit's decision. See Dr. Richard L. Simmons, ASBCA No. 34049, 87-3 BCA ¶ 19,984; Tamp Corp., ASBCA No. 25692, 84-2 BCA ¶ 17,460.
  - c. Moreover, the court has refused to extend Torncello to situations in which the government contracts in good faith while having knowledge of facts putting it on notice that termination may be appropriate in the future. See Krygoski Construction Company, Inc. v. United States, 94 F.3d 1537 (Fed. Cir. 1996); Caldwell & Santmyer, Inc. v. Glickman, 55 F.3d 1578 (Fed. Cir. 1995).
  - d. Contractors occasionally still argue the change in circumstances test, though unsuccessfully. See T&M Distributors, Inc. v. United States, 185 F.3d 1279 (Fed. Cir. 1999).
- 4. Effect of Improper Termination.
  - a. By terminating in bad faith or arbitrarily and capriciously, the government breaches the contract, permitting the contractor to recover breach of contract damages, including anticipatory (lost) profits. See Operational Serv. Corp., ASBCA No. 37059, 93-3 BCA ¶ 26,190 (government breached contract by exercising option year of contract while knowing that it would award a commercial activities contract or perform the work in house).
  - b. The general rule is to place the injured party in as good a position as the one he would have been in had the breaching party fully performed. Remote and consequential damages are not recoverable. Travel Centre v. General Services Administration, GSBICA No. 14057, 99-2 BCA ¶ 30,521 (board denies contractor claims of lost future net income and value of business closed as result of contract termination). But see Energy Capital Corp. v. United States, 47 Fed. Cl. 382 (2000) (awarding \$8.78 million in lost profits to new venture).



C. Revocation of a Termination for Convenience.

1. Reinstatement of the contract. FAR 49.102(d).

a. A terminated portion of a contract may be reinstated in whole or in part if the contracting officer determines in writing that there is a requirement for the terminated items and that the reinstatement is advantageous to the government. To the Administrator, Gen. Servs. Admin., 34 Comp. Gen. 343 (1955).

b. The written consent of the contractor is required. The contracting officer may not reinstate a contract unilaterally.

2. A termination for default cannot be substituted for a termination for convenience. Roged, Inc., ASBCA No. 20702, 76-2 BCA ¶ 12,018; But see Amwest Surety Ins. Co., ENG BCA No. 6036, 94-2 BCA ¶ 26,648 (substitution allowed where government issued “conditional” termination for convenience).

**IV. CONVENIENCE TERMINATION SETTLEMENTS.**

A. Procedures. FAR Part 49.

1. After termination for convenience, the parties must:

a. Stop the work.

b. Dispose of termination inventory.

c. Adjust the contract price.

2. Timing of the termination settlement proposal.

- a. The contractor must submit its termination proposal within **one year** of notice of the termination for convenience. FAR 49.206-1; 52.249-2(j); The Swanson Group, ASBCA No. 52109, 01-1 BCA ¶ 31,164; Do-Well Mach. Shop, Inc. v. United States, 870 F.2d 637 (Fed. Cir. 1989) (“we cannot hold that Congress wanted to prevent parties from agreeing to terms that would further expedite the claim resolution process.”); Industrial Data Link Corp., ASBCA No. 49348, 98-1 BCA ¶ 29,634, aff’d 194 F.3d 1337 (Fed. Cir., 1999); Harris Corp., ASBCA No. 37940, 90-3 BCA ¶ 23,257.
- b. Timely submittal is defined as mailing the proposal within one year after receipt of the termination notice. Voices R Us, Inc., ASBCA No. 51565, 99-1 BCA ¶ 30,213 (denying Government’s summary judgment motion for failure to provide evidence that fax notice of termination was sent to and received by contractor); Jo-Bar Mfg. Corp., ASBCA No. 39572, 93-2 BCA ¶ 25,756 (finding timely mailing despite lack of government receipt).
- c. If a contractor fails to submit its termination settlement proposal within the required time period, or any extension granted by the contracting officer, the contracting officer may then unilaterally determine the amount due the contractor. FAR 49.109-7.
- d. Refusal to grant an extension of time to submit a settlement proposal is not a decision that can be appealed. Cedar Constr., ASBCA No. 42178, 92-2 BCA ¶ 24,896.

B. Amount of Settlement.

1. Methods of settlement. FAR 49.103.

- a. Bilateral negotiations between the contractor and the government.
- b. Unilateral determination of the government. FAR 49.109-7. This method is appropriate only when the contractor fails to submit a proposal or a settlement cannot be reached by agreement.

2. Bases of settlement. The two bases for settlement proposals are the inventory basis (the preferred method), and the total cost basis. FAR 49.206-2.
  - a. Inventory basis. Settlement proposal must itemize separately:
    - (1) Metals, raw materials, purchased parts, work in process, finished parts, components, dies, jigs, fixtures, and tooling, at purchase or manufacturing cost;
    - (2) Charges such as engineering costs, initial costs, and general administrative costs;
    - (3) Costs of settlements with subcontractors;
    - (4) Settlement expenses; and
    - (5) Other proper charges;
    - (6) An allowance for profit or adjustment for loss must be made to complete the gross settlement proposal.
  - b. Total cost basis. Used only when approved in advance by the TCO and when use of inventory basis is impracticable or will unduly delay settlement, as when production has not commenced and accumulated costs represent planning and preproduction expenses.
3. Convenience termination settlements are based on costs incurred in the performance of terminated work, plus a fair and reasonable profit on the incurred costs, plus settlement expenses. See FAR 31.205-42; *Teems, Inc. v. General Services Administration*, GSBCA No. 14090, 98-1 BCA ¶ 29,357.
4. The contractor has the burden of establishing its proposed settlement amount. FAR 49.109-7(c); *American Geometrics Constr. Co.*, ASBCA No. 37734, 92-1 BCA ¶ 24,545.

5. As a general rule, a termination for convenience converts the terminated portion of a fixed-price contract to a cost-reimbursement type of contract, so costs on the settlement proposal are determined under FAR Part 31 Cost Principles and Procedures. See FAR 31.205-42 – Termination Costs (these principles to be used in conjunction with other cost principles in Subpart 31.2), which lists the following categories of costs:
  - a. Common items;
  - b. Costs continuing after termination;
  - c. Initial costs;
  - d. Loss of useful value of special tooling and machinery;
  - e. Rental under unexpired leases;
  - f. Alteration of leased property;
  - g. Settlement expenses; and
  - h. Subcontractor claims.
6. The cost principles must be applied subject to the fairness principle set forth at FAR 49.201(a), which states:
  - a. A settlement should compensate the contractor fairly for the work done and the preparations made for the terminated portions of the contract, including a reasonable allowance for profit. See Ralcon, Inc., ASBCA No. 43176, 94-2 BCA ¶ 26,935 (rejecting contracting officer's use of DFARS weighted guidelines, and instead requiring use of factors at FAR 49.202 to determine reasonable profit).

- b. Fair compensation is a matter of judgment and cannot be measured exactly. In a given case, various methods may be equally appropriate for arriving at fair compensation. The use of business judgment, as distinguished from strict accounting principles, is the heart of a settlement. See Codex Corp. v. United States, 226 Ct. Cl. 693 (1981) (board decision disallowing pre-contract costs based on strict application of cost principles was remanded for further consideration by the board based on the court's determination that cost principles must be applied "subject to" the fairness concept in FAR 49.201). See also J.W. Cook & Sons, ASBCA No. 39691, 92-3 BCA ¶ 25,053 (board definition of "fairness").
7. Cost of Termination Inventory. Except for normal spoilage and except to the extent that the government assumed the risk of loss, the Contracting Officer shall exclude from the amounts due the contractor the fair value of property that is destroyed, lost, stolen, or damaged so as to become undeliverable to the Government. FAR 52.249-2(h). See Lisbon Contractors, Inc. v. United States, 828 F.2d 759 (Fed. Cir. 1987) (contractor can't recover "simply by pleading ignorance" of fate of materials); Industrial Tectonics Bearings Corp. v. United States, 44 Fed. Cl. 115 (1999) ("fair value" means "fair market value" and not the amount sought by the contractor).
8. Common items.
  - a. FAR 31.205-42(a) provides that "[t]he costs of items reasonably usable on the contractor's other work shall not be allowable unless the contractor submits evidence that the items could not be retained at cost without sustaining a loss."
  - b. Courts and boards have applied this provision to more than just materiel costs. Dairy Sales Corp. v. United States, 593 F.2d 1002 (Ct. Cl. 1979) (cost of butter wrapping machine not allowed in a partial termination of a butter packing contract); Hugo Auchter GmbH, ASBCA No. 39642, 91-1 BCA ¶ 23,645 (general purpose off-the-shelf computer equipment).

9. Subcontract Settlements. FAR 49.108.
  - a. Upon termination of a prime contract, the prime and each subcontractor are responsible for prompt settlement of the settlement proposals of their immediate subcontractors. FAR 49.108-1.
  - b. Such subcontractor recovery amounts are allowable as part of the prime's termination for convenience settlement with the government. FAR 31.205-42(h).
  - c. The TCO shall examine each subcontract settlement to determine that it was arrived at in good faith, is reasonable in amount, and is allocable to the terminated portion of the contract. FAR 49.108-3(c). A contractor's settlement with a subcontractor must be done at "arm's-length", or it may be disallowed. Bos'n Towing & Salvage Co., ASBCA No. 41357, 92-2 BCA ¶ 24,864 (denying claim for costs of terminating charter of tug boats).
10. Offsets. See Applied Companies v. United States, 37 Fed. Cl. 749 (1997) (Army properly withheld \$1.9 million from termination settlement due to overpayments on another contract).
11. Settlement Expenses. FAR 31.205-42(g).
  - a. Accounting, legal, clerical, and similar costs reasonably necessary for: (1) the preparation and presentation, including supporting data, of settlement claims to the contracting officer; and (2) the termination and settlement of subcontracts.
  - b. Reasonable costs for the storage, transportation, protection, and disposition of property acquired or produced for the contract.
  - c. Indirect costs related to salary and wages incurred as settlement expenses in a and b above; normally limited to payroll taxes, fringe benefits, occupancy costs, and immediate supervision costs.

12. Loss Contracts.

- a. A contracting officer may not allow profit in settling a termination claim if it appears that the contractor would have incurred a loss had the entire contract been completed. FAR 49.203.
- b. If the contractor would have suffered a loss on the contract in the absence of the termination, the contractor may recover only the same percentage of costs incurred as would have been recovered had the contract gone to completion. The rate of loss is applied to costs incurred to determine the cost recovery. FAR 49.203.
- c. The government has the burden of proving that the contractor would have incurred a loss at contract completion. Balimoy Mfg. Co. of Venice, ASBCA Nos. 47140 and 48165, 98-2 BCA ¶ 30,017, aff'd, 2000 U.S. App. LEXIS 26702 (Fed. Cir. 2000); R&B Bewachungs, GmbH, ASBCA No. 42214, 92-3 BCA ¶ 25,105.
- d. The target price of the fixed items, rather than the ceiling price, is used to compute the loss adjustment ratio for a convenience termination of a contract with both firm fixed price items and fixed price incentive fee line items. Boeing Defense & Space Group, ASBCA No. 51773, 98-2 BCA ¶ 30,069.

C. Special Considerations.

1. Merger. Claims against the government are generally merged with the termination for convenience settlement proposal; therefore, it is not necessary to distinguish equitable adjustment costs from normal performance costs unless the contract is in a loss status. Worsham Constr. Co., ASBCA No. 25907, 85-2 BCA ¶ 18,016.
2. Equitable adjustments. In cases of partial terminations a contractor may request an equitable adjustment for the continued portion of the contract. See 52.249-2(l) (requiring proposal to be submitted within 90 days of effective date of termination unless extended in writing by KO); Varo Inc., ASBCA Nos. 47945, 47946, 98-1 BCA ¶ 29,484 (affirmative defense of untimeliness waived where not raised until third day of hearing).

3. Mutual fault. If both the government and the contractor are responsible for the causes resulting in termination of a contract, contractors have been denied full recovery of termination costs.
  - a. In Dynalelectron Corp. v. United States, 518 F.2d 594 (Ct. Cl. 1975), the court allowed the contractor only one-half of the allowable termination for convenience costs because the contractor was at fault in continuing to incur costs while trying to meet impossible government specifications without notifying the government of its efforts.
  - b. In Insul-Glass, Inc., GSBCA No. 8223, 89-1 BCA ¶ 21,361, the board denied termination for convenience recovery because of the contractor's deficient administration of the contract. The board noted that under the default clause, if the default is determined to be improper, "the rights and obligations of the parties shall be the same as if a notice of termination for convenience of the government had been issued. We may exercise our equitable powers, however, to fashion, in circumstances where both parties share in the blame for the predicament which engenders an appeal, a remedy which apportions costs fairly."
4. When does a T4C proposal become a claim?
  - a. Once the parties reach an "impasse" in settlement negotiations, a request that the contracting officer render a final decision is implicit in the contractor's settlement proposal.
  - b. Once the parties reach an impasse, the proposal becomes a claim under the Contract Disputes Act. James M. Ellet Constr. Co. v. United States, 93 F.3d 1537 (Fed. Cir. 1996); Rex Systems, Inc. v. Cohen, 224 F.3d 1367 (Fed. Cir. 2000) (no impasse entitling contractor to interest despite taking 2 ½ years to settle the termination); Mediatrix Interactive Technologies, Inc., ASBCA No. 43961, 99-2 BCA ¶ 30,318.



D. Limitations on Termination for Convenience Settlements.

1. Overall contract price for fixed-price contracts.
  - a. The total settlement may not exceed the contract price (less payments made or to be made under the contract) - plus the amount of the settlement expenses. FAR 49.207; FAR 52.249-2; Tom Shaw, Inc., ENG BCA No. 5540, 93-2 BCA ¶ 25,742. See also Alta Constr. Co., PSBCA No. 1463, 92-2 BCA ¶ 24,824.
  - b. Compare Okaw Indus., ASBCA No. 17863, 77-2 BCA ¶12,793 (the contract price of items terminated on an indefinite quantity contract is the price of the ordered quantity, not of the estimated quantity, where the government has ordered the minimum quantity) with Aviation Specialists, Inc., DOT BCA No. 1967, 91-1 BCA ¶ 23,534 (the only reasonable measure of the maximum recovery under a requirements contract is the government estimate.)
2. Add the cost of valid pending claims for government delay, defective specifications, etc., to the original contract price to establish the “ceiling” of convenience termination recovery. See, e.g., Wolfe Constr. Co., ENG BCA No. 5309, 88-3 BCA ¶ 21,122.
3. A contractor is not entitled to anticipatory profits or consequential damages. FAR 49.202; Dairy Sales Corp. v. United States, 593 F.2d 1002 (Ct. Cl. 1979); Centennial Leasing Corp., ASBCA No. 49217, 96-2 BCA ¶ 28,571.

E. Commercial Items – Termination For Convenience

1. Background. The Federal Acquisition Streamlining Act, P.L. 103-355, 108 Stat. 3243 (Oct. 13, 1994), established special requirements for the acquisition of commercial items. Congress intended government acquisitions to more closely resemble those customarily used in the commercial market place. FAR 12.201.

2. Policy. The contracting officer should exercise the government's right to terminate a contract for a commercial item only when such a termination would be in the best interests of the government. FAR 12.403(b).
3. When the contracting officer terminates for convenience a commercial item contract, the contractor shall be paid -- (i) The percentage of the contract price reflecting the percentage of the work performed prior to the notice of the termination, and (ii) Any charges the contractor can demonstrate directly resulted from the termination. The contractor may demonstrate such charges using its standard record keeping system and is not required to comply with the cost accounting standards or the contract cost principles in Part 31. The Government does not have any right to audit the contractor's records solely because of the termination for convenience. FAR 12.403(d).
4. Generally, the parties should mutually agree upon the requirements of the termination proposal. The parties must balance the Government's need to obtain sufficient documentation to support payment to the contractor against the goal of having a simple and expeditious settlement. FAR 12.403(d).

F. Fiscal Considerations

1. An agency must analyze each contract that it plans to terminate for convenience to determine whether termination for convenience or completion of the contract is less costly or otherwise in the best interests of the government.
2. An agency must determine whether the convenience termination settlement would be governed by:
  - a. Standard FAR convenience termination clause provisions, or
  - b. Contract specific terms, such as termination ceilings, multi-year contract termination costs, or other specific contractual terms.

3. An agency must determine how to dispose of the funds obligated for the terminated contract.
  - a. No continuing bona fide need. The contracting officer is responsible for deobligating all funds in excess of the estimated termination settlement costs. FAR 49.101(f); DOD Financial Management Regulation 7000.14-R, vol. 3, ch. 8, para. 080512.
  - b. Continuing bona fide need. The general rule is that a prior year's funding obligation is extinguished upon termination of a contract, and funds will **not** remain available to fund a replacement contract in a subsequent year where a contracting officer terminates a contract for the convenience of the government.
    - (1) GAO Exceptions to the general rule.
      - (a) Funds originally obligated in one fiscal year for a contract that is later terminated for convenience in response to a court order or to a determination by the Government Accountability Office or other competent authority that the award was improper, remain available in a subsequent fiscal year to fund a replacement. Funding of Replacement Contracts, B-232616, 68 Comp. Gen. 158 (1988).
      - (b) Funds originally obligated in one fiscal year for a contract that is later terminated for convenience as a result of the contracting officer's determination that the award was clearly erroneous, remain available in a subsequent fiscal year to fund a replacement. Navy, Replacement Contract, B-238548, 70 Comp. Gen. 230 (1991).
    - (2) The two rules apply subject to the following conditions:
      - (a) The original award was made in good faith;
      - (b) The agency has a continuing bona fide need for the goods or services involved;

- (c) The replacement contract is of the same size and scope as the original contract;
  - (d) The replacement contract is executed without undue delay after the original contract is terminated for convenience; and,
  - (e) If the termination for convenience is issued by the contracting officer, the contracting officer's determination that the award was improper is supported by findings of fact and law.
- (3) Bid Protests or other challenge. 31 U.S.C. § 1558; DFAS-IN 37-1, para. 080608.
- (a) Funds available at the time of protest or other action filed in connection with a solicitation for, proposed award of, or award of such contract, remain available for obligation for 100 days after the date on which the final ruling is made on the protest or other action.
  - (b) A protest or other action consists of a protest filed with the Government Accountability Office, or an action commenced under administrative procedures or for a judicial remedy if the action involves a challenge to—
    - (i) a solicitation for a contract;
    - (ii) a proposed award for a contract;
    - (iii) an award of a contract; or
    - (iv) the eligibility of an offeror or potential offeror for a contract or of the contractor awarded the contract; and

- (v) commencement of the action delays or prevents an executive agency from making an award of a contract or proceeding with a procurement.
- (c) A ruling is considered final on the date on which the time allowed for filing an appeal or request for reconsideration has expired, or the date on which a decision is rendered on such an appeal or request, whichever is later. 31 U.S.C. § 1558.
  - (1) A request for reconsideration of a GAO protest must be made within ten days after the basis for reconsideration is known or should have been known, whichever is earlier. 4 C.F.R. § 21.14(b).
  - (2) The appeal of a protest decision of a district court or the Court of Federal Claims must be filed with the Court of Appeals for the Federal Circuit within 60 days after the judgment or order appealed from is entered. Fed. R. App. P. 4(a)(1)(B).

## **V. CONCLUSION.**



## **CHAPTER 19**

### **CONTRACT TERMINATIONS FOR DEFAULT**

I. INTRODUCTION.....	1
A. General.....	1
B. Definition of Default.....	1
C. Review of Default Terminations by the Courts and Boards. ....	1
II. THE RIGHT TO TERMINATE FOR DEFAULT. ....	2
A. Contractual Rights. ....	2
B. Common-Law Doctrine. ....	2
III. GROUNDS FOR TERMINATION.....	3
A. Failure to Deliver or Perform on Time. ....	3
B. Failure to Make Progress so as to Endanger Performance. ....	4
C. Failure to Perform Any Other Provision of the Contract.....	5
D. Other Contract clauses providing independent basis to terminate for default.....	6
E. Anticipatory Repudiation.....	7
F. Demand For Assurance.....	8
G. Defending a termination action.....	8
IV. NOTICE REQUIREMENTS.....	9
A. Cure Notice. ....	9
B. Show Cause Notice.. ....	10
V. CONTRACTOR DEFENSES TO A TERMINATION FOR DEFAULT.....	12
A. Excusable Delay.....	12
B. Waiver.....	16

VI.	THE DECISION TO TERMINATE FOR DEFAULT.....	20
A.	Discretionary Act. ....	20
B.	Regulatory guidance. ....	23
VII.	RIGHTS & LIABILITIES ARISING FROM TERMINATIONS FOR DEFAULT.....	27
A.	Contractor Liability.....	27
B.	The Government’s Liabilities. ....	30
VIII.	TERMINATION OF COMMERCIAL ITEM CONTRACTS. ....	31
A.	Background. ....	31
B.	Applicable Rules for Terminations for Cause. ....	31
C.	Policy ....	31
D.	Termination for Cause Highlights ....	31
IX.	MISCELLANEOUS. ....	32
A.	Portion of the Contract That May Be Terminated for Default.....	32
B.	Availability of Funds. ....	33
C.	Conversion to Termination for Convenience.....	33
D.	T4C Proposals while T4D appeal is pending.....	33
X.	CONCLUSION. ....	33



## **CHAPTER 19**

### **CONTRACT TERMINATIONS FOR DEFAULT**

#### **I. INTRODUCTION.**

- A. General. Courts and boards hold the government to a high standard when terminating a contract for default because of the adverse impact such an action has on a contractor. Indeed, judges often describe terminations for default as a “contractual death sentence.” Unfortunately, government officials frequently fail to follow prescribed procedures, rendering default terminations subject to reversal on appeal. Prior to issuing a default termination notice, contracting officers must have a valid basis for the termination, must issue proper notices, must account for the contractor’s excusable delay, must act with due diligence, and must make a reasonable determination while exercising independent judgment. Attorneys play a critical role in this process, ensuring that all legal requirements are met and the termination decision receives the care and attention it deserves.
- B. Definition of Default. A contractor’s unexcused present or prospective failure to perform in accordance with the contract’s terms, specifications, or delivery schedule constitutes contractual default under government contracts. See FAR 49.401.
- C. Review of Default Terminations by the Courts and Boards.
  - 1. “[A] termination for default is a drastic sanction that should be imposed upon a contractor only for good cause and in the presence of solid evidence.” Lisbon Contractors, Inc. v. United States, 828 F.2d 759 (Fed. Cir. 1987); Mega Constr. Co. v. United States, 25 Cl. Ct. 735 (1992).
  - 2. Burden of Proof.
    - a. It is the government’s burden to prove, by a preponderance of the evidence, that the termination for default was proper. Lisbon Contractors, Inc. v. United States, 828 F.2d 759 (Fed. Cir. 1987); Walsky Constr. Co., ASBCA No. 41541, 94-1 BCA ¶ 26,264.

MAJ Michael Norris  
54th Graduate Course  
Fall 2005

- b. A contractor's technical default is not determinative of its propriety. The Government must exercise its discretion reasonably to terminate a contract for default. Darwin Constr. Co. v. United States, 811 F.2d 593 (Fed. Cir. 1987).
- c. Once the government has met its burden of demonstrating the appropriateness of the default, the contractor has the burden of proof that its failure to perform was the result of causes beyond its control and without fault on its part. International Elec. Corp. v. United States, 646 F.2d 496 (Ct. Cl. 1981); Composite Int'l, Inc., ASBCA No. 43359, 93-2 BCA ¶ 25,747.

## II. THE RIGHT TO TERMINATE FOR DEFAULT.

### A. Contractual Rights.

- 1. The FAR contains various Default clauses for use in government contracts that identify the conditions that permit the government to terminate a contract for default.
- 2. The clauses contain different bases for termination and different notice requirements. For example, the Fixed-Price Supply and Service clause (FAR 52.249-8) is different from the Fixed-Price Construction clause (FAR 52.249-10).

### B. Common-Law Doctrine.

- 1. The standard FAR Default clauses provide: "The rights and remedies of the government in this clause are in addition to any other rights and remedies provided by law or under this contract." See FAR 52.249-8 and FAR 52.249-10.
- 2. Courts commonly cite the above-quoted provision to support the government's termination of a contract for default based on common-law doctrines such as anticipatory repudiation. Cascade Pac. Int'l v. United States, 773 F.2d 287 (Fed. Cir. 1985).

### III. GROUNDS FOR TERMINATION.

#### A. Failure to Deliver or Perform on Time.

1. This ground is commonly referred to as an “(a)(1)(i)” termination. FAR 52.249-8(a)(1)(i); 52.249-10(a).
2. Generally, time is of the essence in all government contracts containing fixed dates for delivery or performance. Devito v. United States, 413 F.2d 1147 (Ct. Cl. 1969); Kit Pack Co., ASBCA No. 33135, 89-3 BCA ¶ 22,151
3. When a contract does not specify delivery dates (or those dates have been waived) actual delivery could constitute the “delivery date” for purposes of the T4D clause. Aerometals, Inc., ASBCA No. 53688, 2003 ASBCA LEXIS 74 (June 25, 2003).
4. Compliance with specifications.
  - (a) The government is entitled to strict compliance with its specifications. Mega Constr. Co. v. United States, 25 Cl. Ct. 735 (1992); Kurz-Kasch, Inc., ASBCA No. 32486, 88-3 BCA ¶ 21,053.
  - (b) However, courts and boards recognize the common-law principles of **substantial compliance** (supply) and **substantial completion** (construction) to protect the contractor where timely performance departs in minor respects from that required by the contract. If the contractor substantially complies with the contract, the government must give the contractor additional time to correct the defects prior to terminating for default. Radiation Technology, Inc. v. United States, 366 F.2d 1003 (Ct. Cl. 1966); FD Constr. Co., ASBCA No. 41441, 91-2 BCA ¶ 23,983 (contractor not protected under doctrine of substantial completion because it abandoned the work and refused to complete punchlist and administrative items).

B. Failure to Make Progress so as to Endanger Performance.

1. Supply and Service. The Default clauses for fixed-price supply and service contracts and cost-reimbursement contracts provide for termination when the contractor fails to make progress so as to endanger performance. This is commonly referred to as an “(a)(1)(ii)” termination. FAR 52.249-8(a)(1)(ii); FAR 52.249-6(a).
2. Construction. The Default clause for fixed-price construction contracts provides for termination when the contractor refuses or fails to prosecute the work or any separable part, with the diligence that will insure its completion within the time specified in the contract. FAR 52.249-10(a).
3. Proof.
  - a. The government is not required to show that it was impossible for the contractor to complete performance. California Dredging Co., ENG BCA No. 5532, 92-1 BCA ¶ 24,475.
  - b. Rather, the contracting officer must have a **reasonable belief** that there is no reasonable likelihood that the contractor can perform the entire contract effort within the time remaining for contract performance. Lisbon Contractors, Inc. v. United States, 828 F.2d 759 (Fed. Cir. 1987) (upholding the lower court's conversion of the T4D to a T4C where government did not determine whether contractor could complete work within the required time, or determine how long it would take a follow-on contractor to do the work); Pipe Tech, Inc., ENG BCA No. 5959, 94-2 BCA ¶ 26,649 (termination improper where 92% of contract performance time remained and procurement contractor fully performed within the time allowed in defaulted contract).
  - c. Prior to termination, the contracting officer should analyze progress problems against a specified completion date, adjusted to account for any government-caused delays. Technocratica, ASBCA No. 44134, 94-2 BCA ¶ 26,606 (termination for “poor progress” improper).

- d. Factors to consider include, but are not limited to: “a comparison of the percentage of work completed and” the time remaining before completion is due; “the contractor’s failure to meet progress milestones”; “problems with subcontractors and suppliers”; “the contractor’s financial situation”; and, the contractor’s past performance. McDonnell Douglas Corp. v. United States, 323 F.3d 1006, 1010 (Fed. Cir. 2003)

C. Failure to Perform Any Other Provision of the Contract.

1. Supply and Service. The default clause in fixed-price supply and service contracts specifically provides this ground for termination. It is commonly referred to as an “(a)(1)(iii)” termination. FAR 52.249-8(a)(1)(iii).
2. Construction. This basis does not exist under the construction clauses. See FAR 52.249-10. However, the courts and boards may sustain default terminations of construction contracts on this ground by reasoning that the failure to perform the "other provision" renders the contractor unable to perform the work with the diligence required to insure timely completion. Engineering Technology Consultants, S.A., ASBCA No. 43454, 94-1 BCA ¶ 26,586 ("The Government, reasonably we conclude, had no alternative but to stop performance based on ETC's failure to maintain the proper amount of insurance coverage. Under the circumstances ETC was unable to perform and/or prosecute the work with the diligence required to insure completion within the performance period.").
3. Courts and boards will not sustain a default termination unless that “other provision” of the contract is a “material” or “significant” requirement. Precision Prods., ASBCA No. 25280, 82-2 BCA ¶ 15,981 (noncompliance with first article manufacture requirements not deemed material under facts).
4. Examples.
  - a. Failure to employ drivers with valid licenses. Maywood Cab Service, Inc., VACAB No. 1210, 77-2 BCA ¶ 12,751.

- b. Failure to obtain liability insurance. UMM, Inc., ENG BCA No. 5330, 87-2 BCA ¶ 19,893 (mowing services contract).
  - c. Violation of the Buy American Act. HR Machinists Co., ASBCA No. 38440, 91-1 BCA ¶ 23,373.
  - d. Failure to comply with statement of work. 4-D and Chizoma, Inc., ASBCA Nos. 49550, 49598, 00-1 BCA ¶ 30,782 (failure to properly videotape sewer line).
  - e. Failure to retain records under Payrolls and Basic Records Clause justified default under the Davis-Bacon Act. Kirk Bros. Mech. Contractors, Inc. v. Kelso, 16 F.3d 1173 (Fed. Cir. 1994)
- D. Other Contract clauses providing independent basis to terminate for default.
- 1. FAR 52.203-3 (Gratuities clause);
  - 2. FAR 52.209-5 (Certification Regarding Debarment, Suspension, Proposed Debarment, and Other Responsibility Matters). See Spread Information Sciences, Inc., ASBCA No. 48438, 96-1 BCA¶ 27,996.
  - 3. FAR 52.222-26 (Equal Opportunity clause);
  - 4. FAR 52.228-1 (Bid Guarantee clause);
  - 5. FAR 52.246-2 (Inspection clause).

E. Anticipatory Repudiation.

1. Each party to a contract has the common-law right to terminate a contract upon actual or anticipatory repudiation of the contract by the other party. Restatement (Second) of Contracts § 250; Uniform Commercial Code § 210; Dingley v. Oler, 117 U.S. 490 (1886). See also, Franconia Associates, et al., v. United States, 122 S. Ct. 1993 (2002) (discussing the difference between an immediate breach and repudiation in the context of a federal housing loan program).
2. This common-law basis for default applies to all government contracts, since contract clauses generally do not address or supersede this principle. Cascade Pac. Int'l v. United States, 773 F.2d 287 (Fed. Cir. 1985).
  - a. Anticipatory repudiation must be express. United States v. DeKonty Corp., 922 F.2d 826 (Fed. Cir. 1991) (must be absolute refusal, distinctly and unequivocally communicated); Marine Constr. Dredging, Inc., ASBCA No. 38412, 95-1 BCA ¶ 27,286 (no repudiation where contractor did not continue performance due to government's failure to issue appropriate instructions).
  - b. Anticipatory repudiation must be unequivocal and manifest either a clear intention not to perform or an inability to perform the contract. Ateron Corp., ASBCA No. 46352, 94-3 BCA ¶ 27,229 (contractor's statement that continued contract performance is impossible constituted repudiation). Compare Swiss Prods., Inc., ASBCA No. 40031, 93-3 BCA ¶ 26,163 (contractor's refusal to perform until government provided advance payments constitutes repudiation), with Engineering Professional Servs., Inc., ASBCA No. 39164, 94-2 BCA ¶ 26,762 (no repudiation where contractor's statement that "government financing must be provided to assure contract completion" was not precondition to resumed performance).
3. Abandonment is actual repudiation. Compare Ortec Sys., Inc., ASBCA No. 43467, 92-2 BCA ¶ 24,859 (termination proper when work force left site and contractor failed to respond to phone calls), with Western States Mgmt. Servs., Inc., ASBCA No. 40212, 92-1 BCA ¶ 24,714 (no abandonment when contractor was unable to perform by unreasonable start date established after disestablishment of original start date).

F. Demand For Assurance.

1. Failure by one party to give adequate assurances that it would complete a contract is a valid basis for a default termination under common-law. Restatement (Second) of Contracts § 251; Uniform Commercial Code § 2-609.
2. This basis for termination applies to government contracts. Danzig v. AEC Corp., 224 F.3d 1333 (Fed. Cir. 2000) (AEC's letter responses and conduct following the Navy's cure notice supported T4D); Engineering Professional Servs., Inc., ASBCA No. 39164, 94-2 BCA ¶ 26,762; National Union Fire Ins. Co., ASBCA No. 34744, 90-1 BCA ¶ 22,266. But see Ranco Constr., Inc. v. Gen. Servs. Admin., GSBCA No. 11923, 94-2 BCA ¶ 26,678 (board questions whether demand for assurance under UCC § 2-609 applies to construction contracts).
3. The government's "cure notice" may be the equivalent of a demand for assurance. Hannon Elec. Co. v. United States, 31 Fed. Cl. 135 (1994) (contractor's failure to provide adequate assurance in response to cure notice justified default termination); Fairfield Scientific Corp., ASBCA No. 21151, 78-1 BCA ¶ 13082.

G. Defending a termination action.

1. When a contractor appeals a final decision terminating a contract for default, the government is not bound by the contracting officer's reasons for the termination as stated in the termination notice.
2. If a proper ground for the default termination existed at the time of the termination, regardless of whether the contracting officer relied on or was even aware of that basis, the termination is proper. See Glazer Construction Co. v. United States, 52 Fed. Cl. 513 (2002) (COFC upheld a termination for default based on Davis-Bacon Act violations committed before, but discovered after, the government issued the default termination notice); Kirk Bros. Mech. Contractors, Inc. v. Kelso, 16 F.3d 1173 (Fed. Cir. 1994) (violations of Davis-Bacon Act); Joseph Morton Co. v. United States, 757 F.2d 1273 (Fed. Cir. 1985) (fraud); Quality Granite Constr. Co., ASBCA No. 43846, 93-3 BCA ¶ 26,073 (government not required to give notice to contractor when unaware of basis for termination).



#### IV. NOTICE REQUIREMENTS.

##### A. Cure Notice.

1. For fixed-price supply or service contracts, research and development contracts, and cost-reimbursement contracts, the government must notify the contractor, in writing, of its failure to make progress ((a)(1)(ii)) or its failure to perform any other provision of the contract ((a)(1)(iii)) and give the contractor 10 days in which to cure such failure before it may terminate the contract. FAR 52.249-6; FAR 52.249-8; FAR 52.249-9. See FAR 49.607(a).
  - a. A proper cure notice must inform the contractor in writing:
    - (1) That the government intends to terminate the contract for default;
    - (2) Of the reasons for the termination; and
    - (3) That the contractor has a right to cure the specified deficiencies within the cure period (10 days).
  - b. To support a default decision, the cure notice must clearly identify the nature and extent of the performance failure. Lanzen Fabricating, Inc., ASBCA No. 40328, 93-3 BCA ¶ 26,079 (show cause notice did not serve as cure notice for purposes of (a)(1)(ii) termination because it didn't specify failures to be cured); Insul-Glass, Inc., GSBCA No. 8223, 89-1 BCA ¶ 21,361 (notice directed contractor to provide acceptable drawings without specifying what the contractor had to do to make the drawings acceptable).
  - c. The government must give the contractor a minimum of ten days to cure the deficiency. Red Sea Trading Assoc., ASBCA No. 36360, 91-1 BCA ¶ 23,567 (the ten day period need not be specifically stated in the notice if a minimum of ten days was actually afforded the contractor).

2. The government may terminate cost-reimbursement contracts for default if the contractor defaults in performing the contract and fails to cure the defect in performance within ten days of receiving a proper cure notice from the contracting officer. FAR 52.249-6(a)(2).
3. A cure notice is **NOT** required before:
  - a. Terminating for failure to timely deliver goods. Delta Indus., DOT BCA No. 2602, 94-1 BCA ¶ 26,318 (government rejected desks that did not meet contract specifications).
  - b. Terminating pursuant to an independent clause of the contract not requiring notice. See “K” Servs., ASBCA No. 41791, 92-1 BCA ¶ 24,568 (default under FAR 52.209-5 for false certification regarding debarment status of contractor's principal).
  - c. Terminating based on the contractor’s anticipatory repudiation of the contract. Beeston, Inc., ASBCA No. 38969, 91-3 BCA ¶ 24,241; Scott Aviation, ASBCA No. 40776, 91-3 BCA ¶ 24,123.
  - d. Terminating construction contracts. FAR 52.249-10. Although not required, the government frequently provides the contractor a cure notice prior to terminating these contracts. See Hillebrand Constr. of the Midwest, Inc., ASBCA No. 45853, 95-1 BCA ¶ 27,464 (failure to provide submittals); Engineering Technology Consultants, S.A., ASBCA No. 43454, 94-1 BCA ¶ 26,586 (concerning contractor's failure to provide proof of insurance).
- B. Show Cause Notice. If a termination for default appears appropriate, the government **should, if practicable**, notify the contractor in writing of the possibility of the termination. FAR 49.402-3(e)(1). This notice is referred to as a “show cause” notice. FAR 49.607.
  1. The show cause notice should:
    - a. Call the contractor’s attention to its contractual liabilities if the contract is terminated for default.

- b. Request the contractor to show cause why the contract should not be terminated for default.
  - c. State that the failure of the contractor to present an explanation may be taken as an admission that no valid explanation exists.
- 2. The default clauses do not require the use of a show cause notice. See FAR 52.249-8 (Supply and Service); FAR 52.249-9 (Research and Development); FAR 52.249-10 (Construction); Alberts Assocs., ASBCA No. 45329, 95-1 BCA ¶ 27,480.
  - a. The contracting officer is not required to include every subsequently advanced reason for the termination in the show cause notice because the government is under no obligation to issue the notice. Sach Sinha and Associates, Inc., ASBCA No. 46916, 96-2 BCA ¶ 28,346.
  - b. However, the courts and boards may require a “show cause” notice if its use was practicable. Udis v. United States, 7 Cl. Ct. 379 (1985); Enginetics Corp., ASBCA No. 40834, 92-2 BCA ¶ 24,965 (denying government's motion for summary judgment while noting government's failure to issue show cause notice).
  - c. If the government issues a show cause notice, it need not give the contractor ten days to respond. Nisei Constr. Co., Inc., ASBCA Nos. 51464, 51466, 51646, 99-2 BCA ¶ 30,448 (six days was sufficient in construction default case).

## V. CONTRACTOR DEFENSES TO A TERMINATION FOR DEFAULT.

### A. Excusable Delay.

1. A contractor's failure to deliver or to perform on a fixed-price supply or service contract is excusable if the failure is beyond the control and without the fault or negligence of the contractor. FAR 52.249-8(c).
2. For construction contracts, the contractor is excused if the delay arises from unforeseeable causes beyond the control and without the fault or negligence of the contractor, and the contractor, within 10 days from the beginning of any delay (unless extended by the contracting officer), notifies the contracting officer in writing of the causes of delay. FAR 52.249-10(b).
3. The contractor has the burden of proving that its failure to perform was excusable. The contractor must show:
  - a. The occurrence of an event was unforeseeable (construction only), beyond its control, and without its fault or negligence. Local Contractors, Inc., ASBCA No. 37108, 92-1 BCA ¶ 24,491; Charles H. Siever, ASBCA No. 24814, 83-1 BCA ¶ 16,242.
  - b. Timely performance was actually prevented by the claimed excuse. Sonora Mfg., ASBCA No. 31587, 91-1 BCA ¶ 23,444; Beekman Indus., ASBCA No. 30280, 87-3 BCA ¶ 20,118.
  - c. The specific period of delay caused by the event. Conquest Constr., Inc., PSBCA No. 2350, 90-1 BCA ¶ 22,605.
4. The Default clauses specifically identify some causes of excusable delay. These include:
  - a. Acts of God (AKA "force majeure") or of the public enemy. See Nogler Tree Farm, AGBCA No. 81-104-1, 81-2 BCA ¶ 15,315 (eruption of Mount St. Helens volcano); Centennial Leasing v. Gen. Servs. Admin., GSBGA No. 12037, 94-1 BCA ¶ 26,398 (death of chief operating officer not an act of God).

- b. Acts of the government in either its sovereign or contractual capacity.
  - (1) Sovereign capacity refers to public acts of the government not directed to the contract. Home Entertainment, Inc., ASBCA No. 50791, 99-2 BCA ¶ 30,550 (analysis of “sovereign act” relating to expulsion orders in Panama); Woo Lim Constr. Co., ASBCA No. 13887, 70-2 BCA ¶ 8451 (imposition of security restrictions in a hostile area).
  - (2) Acts of the government in its contractual capacity are most common and include delays caused by such things as defective specifications, unreasonable government inspections and late delivery of government furnished property. See Marine Constr. Dredging, Inc., ASBCA No. 38412, 95-1 BCA ¶ 27,286 (government failed to respond to contractor’s request for directions); John Glenn, ASBCA No. 31260, 91-3 BCA ¶ 24,054 (government issued faulty performance directions).
- c. Fires. Hawk Mfg. Co., GSBCA No. 4025, 74-2 BCA ¶ 10,764 (lack of facilities rather than a plant fire caused contractor's failure to timely deliver).
- d. Floods. Wayne Constr., ENG BCA No. 4942, 91-1 BCA ¶ 23,535 (storm damage to a dike entitled contractor to time extension).
- e. Epidemics and quarantine restrictions. Ace Elecs. Assoc., ASBCA No. 11496, 67-2 BCA ¶ 6456 (denying relief based on allegation that flu epidemic caused a 30% to 40% rate of absenteeism, without showing that it contributed to delay).
- f. Strikes, freight embargoes, and similar work stoppages. Woodington Corp., ASBCA No. 37885, 91-1 BCA ¶ 23,579 (delay not excused where steel strike at U.S. Steel had been ongoing for two months prior to contractor's bid, subcontractor ordered steel after strike ended, and other steel manufacturers were not on strike). But see, NTC Group, Inc., ASBCA Nos. 53720, 53721, 53722, 04-2 BCA 32,706 (labor conspiracy, akin to a strike was a valid defense to default termination).

- g. Unusually severe weather. Only unusually severe weather, as compared to the past weather in the area for that season, excuses performance. See Aulson Roofing, Inc., ASBCA No. 37677, 91-2 BCA ¶ 23,720 (contractor not entitled to day for day delay because some rain delay was to be expected); TCH Indus., AGBCA No. 88-224-1, 91-3 BCA ¶ 24,364 (eight inches of snow in northern Idaho in November is neither unusual nor unforeseeable).
- h. Acts of another contractor in performance of a contract for the government (construction contracts). FAR 52.249-10(b)(1); Modern Home Mfg. Corp., ASBCA No. 6523, 66-1 BCA ¶ 5367 (housing contractor entitled to extension because site not prepared in accordance with contract specifications).
- i. Defaults or delays by subcontractors or suppliers.
  - (1) Construction. If the delay of a subcontractor or supplier at any tier arises from unforeseeable causes beyond the control and without the fault or negligence of both the contractor and the subcontractor or supplier, and the contractor notifies the contracting officer within ten days from the beginning of the delay, it may be excusable. FAR 52.249-10(b).
  - (2) Supply and Services contracts, and cost-reimbursement contracts. The general rule is that if a failure to perform is caused by the default of a subcontractor or supplier at any tier, the default is excusable if:
    - (a) The cause of the default was beyond the control and without the fault or negligence of either the contractor or the subcontractor; and,

- (b) The subcontracted supplies or services were not obtainable from other sources in time for the contractor to meet the required delivery schedule. FAR 52.249-8(d); FAR 52.249-6(b); FAR 52.249-14(b); Progressive Tool Corp., ASBCA No. 42809, 94-1 BCA ¶ 26,413 (contractor failed to show it made all reasonable attempts to locate an alternate supplier); CM Mach. Prods., ASBCA No. 43348, 93-2 BCA ¶ 25,748 (default upheld where plating could have been provided by another subcontractor but prime refused to pay higher price).

5. Additional excuses commonly asserted by contractors include:

- a. Material breach of contract by the government. Todd-Grace, Inc., ASBCA No. 34469, 92-1 BCA ¶ 24,742 (breach of implied duty to not interfere with contractor); Bogue Elec. Mfg. Co., ASBCA No. 25184, 86-2 BCA ¶ 18,925 (defective government-furnished equipment).
- b. Lack of financial capability. Contractors are responsible for having sufficient financial resources to perform a contract.
  - (1) Generally, this is not an excuse. Local Contractors, Inc., ASBCA No. 37108, 92-1 BCA ¶ 24,491 (contractor had deteriorating financial base unconnected to the contract).
  - (2) If the financial difficulties are caused by wrongful acts of the government, however, the delay may be excused. All-State Construction, Inc., ASBCA No. 50586, 02-1 BCA 31,794 (withholding progress payments above the amount allowed by the FAR was improper; ASBCA converted T4D into T4C); Nexus Constr. Co., ASBCA No. 31070, 91-3 BCA ¶ 24,303 (default converted because government's refusal to release progress payments constituted material breach of contract).

- c. Bankruptcy. Although filing a petition of bankruptcy is not an excuse, it precludes termination. Communications Technology Applications, Inc., ASBCA No. 41573, 92-3 BCA ¶ 25,211 (government's right to terminate stayed when bankruptcy filed, not when government notified); See also, Carter Industries, DOTBCA No. 4108, 02-1 BCA 31,738.
  - d. Small business. Kit Pack Co., ASBCA No. 33135, 89-3 BCA ¶ 22,151 (no excuse for failure to meet delivery date).
  - e. Impossibility or Commercial impracticability. To establish commercial impracticability, the contractor must show it can perform only at excessive and unreasonable cost – simple economic hardship is not sufficient. CleanServ Executive Services, Inc., ASBCA No. 47781, 96-1 BCA ¶ 28,027. Compare Soletanche Rodio Nicholson (JV), ENG BCA No. 5796, 94-1 BCA ¶ 26,472 (performance might take 17 years and cost \$400 million, rather than 2 years and \$16.9 million), with CM Mach. Prods., ASBCA No. 43348, 93-2 BCA ¶ 25,748 (no commercial impracticability where costs increased 105%).
6. If a delay is found to be excusable, the contractor is entitled to additional time and/or money. Batteast Constr. Co., ASBCA No. 35818, 92-1 BCA ¶ 24,697. **NOTE:** Constructive acceleration of the delivery date often occurs when the contracting officer, using a threat of termination, directs compliance with the contract delivery or performance date without an extension for the time period attributable to an excusable delay.

B. Waiver.

- 1. Waiver of the right to terminate for default occurs if: (1) the government fails to terminate a contract within a reasonable period of time after the default under circumstances indicating forbearance, and (2) reliance by the contractor on the failure to terminate and continued performance by him under the contract, with the government's knowledge and implied or express consent. Devito v. United States, 413 F.2d 1147 (Ct. Cl. 1969); S.T. Research Corp., ASBCA No. 39600, 92-2 BCA ¶ 24,838; Motorola Computer Sys., Inc., ASBCA No. 26794, 87-3 BCA ¶ 20,032.



2. Absent government manifestation that a performance date is no longer enforceable, the waiver doctrine generally does not apply to construction contracts. Nisei Constr. Co., Inc., ASBCA Nos. 51464, 51466, 51646, 99-2 BCA ¶ 30,448.
  - a. Construction contracts typically include a payment clause entitling the contractor to payment for work performed subsequent to the specified completion date.
  - b. Construction contracts also typically include a liquidated damage clause that entitles the government to money for late completion.
  - c. As a consequence, detrimental reliance usually can't be found merely from government forbearance and continued contractor performance. Brent L. Sellick, ASBCA No. 21869, 78-2 BCA ¶ 13,510. *But see*, B.V. Construction, Inc., ASBCA Nos. 47766, 49337, 50553, 04-1 BCA 32,604 (the lack of a liquidated damages clause coupled with the government's apparent complete lack of concern over the completion date, caused the ASBCA to find the government elected to waive the right to terminate the contract).
3. Reasonable period of time.
  - a. Forbearance is the period of time during which the Government investigates the reasons for the contractor's failure to meet the contract requirements. The government may "forbear" for a reasonable period after the default occurs before taking some action. Reasonableness depends on the specific facts of each case. Progressive Tool Corp., ASBCA No. 42809, 94-1 BCA ¶ 26,413 (although forbearance for 42 days after show cause notice was "somewhat long," T4D sustained because government did not encourage contractor to continue working and contractor did not perform substantial work during that period).

- b. Government actions inconsistent with forbearance may waive a delivery date. Applied Cos., ASBCA No. 43210, 94-2 BCA ¶ 26,837 (government waived delivery date for First Article Test Report by seeking information, making progress payments, directing the contractor to rerun tests, and incorporating engineering change proposals into the contract after the delivery date); Kitco, Inc., ASBCA No. 38184, 91-3 BCA ¶ 24,190 (no clear delivery schedule established after partial termination for convenience resulted in waiver of right to terminate for default based on untimely deliveries); Beta Engineering, Inc., ASBCA Nos. 53570, 53571, 02-2 BCA ¶ 31,879 (after contractor missed a First Article Test delivery deadline, the government left itself without an enforceable schedule by failing to terminate, encouraging continued performance, and leaving contractor “in limbo” about a new delivery schedule).
- c. Contracting officers should use show cause notices to avoid waiver arguments. See Charles H. Siever Co., ASBCA No. 24814, 83-1 BCA ¶ 16,242 (using timely show cause notice preserved government's right to terminate despite four month forbearance period).

4. Detrimental Reliance.

- a. The contractor must show detrimental reliance on the government's inaction before the government will be deemed to have waived the delivery schedule. Ordnance Parts Eng'g Co., ASBCA No. 44327, 93-2 BCA ¶ 25,690 (no detrimental reliance where contractor repudiated contract).
- b. Where the contractor customarily continued performance after a missed delivery date, a board has found no inducement by the government. Electro-Methods, Inc., ASBCA No. 50215, 99-1 BCA ¶ 30,230.

5. Reestablishing the delivery schedule.
- a. The government should reestablish a delivery schedule if it believes it waived the original schedule. FAR 49.402-3(c). Proper reestablishment of a delivery schedule also reestablishes the government's right to terminate for default.
  - b. A delivery schedule can be reestablished either bilaterally or unilaterally. Sermor, Inc., ASBCA No. 30576, 94-1 BCA ¶ 26,302 (formal modification not required, but new delivery date must be reasonable and specific).
    - (1) A new delivery date established bilaterally is presumed to be reasonable. Trans World Optics, Inc., ASBCA No. 35976, 89-3 BCA ¶ 21,895; Sermor, Inc., *supra* (by agreeing to new delivery schedule, contractor waives excusable delay).
    - (2) A new delivery date the government unilaterally establishes must in fact be reasonable in light of the contractor's abilities in order to be enforceable. Rowe, Inc., GSBCA No. 14211, 01-2 BCA 31,630 (The board made an "objective determination" from "the standpoint of the performance capabilities of the contractor at the time the notice [was] given" and found the new delivery date was reasonable); McDonnell Douglas Corp. v. United States, 50 Fed. Cl. 311 (2001) (reestablished schedule was reasonable); Oklahoma Aerotronics, Inc., ASBCA No. 25605, 87-2 BCA ¶ 19,917 (unilateral date for first article delivery unreasonable).
    - (3) The schedule proposed by the contractor is presumed reasonable. Tampa Brass Aluminum Corp., ASBCA No. 41314, 92-2 BCA ¶ 24,865 (termination proper because unreasonable schedule was proposed by the contractor). But see S.T. Research Corp., ASBCA No. 39600, 92-2 BCA ¶ 24,838 (schedule proposed within 24 hours of contracting officer's demand, by contractor having technical problems, was not reasonable).

- c. A cure notice, by itself, does not reestablish a waived delivery schedule. Lanzen Fabricating, ASBCA No. 40328, 93-3 BCA ¶ 26,079.
6. If a contract requires multiple deliveries, each successive increment represents a severable obligation to deliver on the contract delivery date. Thus, the government may accept late delivery of one or more installments without waiving the delivery date for future installments. Electro-Methods, Inc., ASBCA No. 50215, 99-1 BCA ¶ 30,230; Allstate Leisure Prods., Inc., ASBCA No. 40532, 94-3 BCA ¶ 26,992.

## VI. THE DECISION TO TERMINATE FOR DEFAULT.

### A. Discretionary Act.

#### 1. Standard of Review.

- a. The standard FAR clauses generally grant the government the authority to terminate, which shall be exercised only after review by contracting and technical personnel, and by counsel, to ensure propriety of the proposed action. FAR 49.402-3 (a).
- b. Contracting officers must exercise discretion. The default clauses do not **compel** termination; rather, they **permit** termination for default if such action is appropriate in the business judgment of the responsible government officials. Schlesinger v. United States, 182 Ct. Cl. 571, 390 F.2d 702 (1968) (Navy improperly terminated a contract because of pressure from a Congressional committee, rather than its own assessment of the government's and contractor's interests).
- c. Contractors may challenge the default termination decision on the basis that the terminating official abused his discretion or acted in bad faith. Marshall Associated Contractors, Inc., & Columbia Excavating, Inc., (J.V.), IBCA Nos. 1091, 3433, 3434, 3435, 01-1 BCA ¶ 31248 (abuse of discretion to terminate for default a contract with defective specifications, when the repurchase contractor received relaxed treatment); Darwin Constr. Co. v. United States, 811 F.2d 593 (Fed. Cir. 1987).

2. Burden of proof.

- a. The Government has the burden of establishing the propriety of a default termination. Lisbon Contractors, Inc. v. United States, 828 F.2d 759 (Fed. Cir. 1987). A finding of technical default is not determinative on the issue of the propriety of a default termination. Walsky Constr. Co., ASBCA No. 41541, 94-2 BCA ¶ 26,698.
- b. Courts and boards review the KO's actions according to the circumstances as they existed at the time of the default. Local Contractors, Inc., ASBCA No. 37108, 92-1 BCA ¶ 24,491.
- c. Once the Government establishes that the contractor was in default, the contractor bears the burden of proving that the termination was an abuse of discretion or done in bad faith.

(1) Abuse of Discretion.

- (a) Abuse of discretion (also referred to as “arbitrary and capricious” conduct) may be ascertained by looking at the following factors:
  - (i) subjective bad faith on the part of the Government;
  - (ii) no reasonable basis for the decision;
  - (iii) the degree of discretion entrusted to the deciding official;
  - (iv) violation of an applicable statute or regulation. United States Fidelity & Guaranty Co. v. U.S., 676 F.2d 622 (Ct. Cl. 1982); Quality Environment Systems, Inc., ASBCA No. 22178, 87-3 BCA ¶ 20,060.

- (b) The contractor bears the burden of showing an abuse of discretion. Walsky Constr. Co., ASBCA No. 41541, 94-1 BCA ¶ 26,264, aff'd on recon., 94-2 BCA ¶ 26,698 (lieutenant colonel's directive to the contracting officer "tainted the termination"); see also Libertatia Assoc., Inc. v. United States, 46 Fed. Cl. 702 (2000) (once default is established, burden shifts to contractor to show its failure to perform is excusable).
- (c) Recent examples of abuse of discretion: Ryste & Ricas, Inc., ASBCA No. 51841, 02-2 BCA ¶ 31,883 and Bison Trucking and Equipment Company, ASBCA No. 53390, 01-2 BCA ¶31,654.

(2) Bad Faith.

- (a) Contractors asserting that government officials acted in "bad faith" must meet a higher standard of proof. The courts and boards require **"well nigh irrefragable proof"**<sup>1</sup> of "malice" or "designedly oppressive conduct" to overcome the presumption that public officials act in good faith in the exercise of their powers and responsibilities. See Kalvar Corp. v. United States, 543 F.2d 1298 (Ct. Cl. 1976); Apex Int'l Mgmt. Servs., Inc., ASBCA No. 38087, 94-2 BCA ¶ 26,842, aff'd on recon., 94-2 BCA ¶ 26,852 (Navy officials acted in bad faith by "declaring war" against the contractor; contractor entitled to breach damages).
- (b) Government officials are presumed to have acted conscientiously in making a default termination decision. Mindeco Corp., ASBCA No. 45207, 94-1 BCA ¶ 26,410; Local Contractors, Inc., ASBCA No. 37108, 92-1 BCA ¶ 24,491.

---

<sup>1</sup> "One COFC judge contends that the "irrefragable" (meaning "impossible to refute") standard of proof appears to exceed the beyond a reasonable doubt standard employed in criminal law cases, and would therefore insulate the government from any review by the courts. The judge went on to analyze the case by applying the Kalvar standard, that is, looking for evidence of specific intent to injure, or action taken out of animus toward, the contractor. Libertatia Assoc., Inc. v. U.S., 46 Fed. Cl. 702 (2000).

- (c) Proof of bad faith requires specific intent to retaliate against or injure plaintiff to support an allegation of bad faith. Kalvar Corp. v. United States, 543 F.2d 1298 (Ct. Cl. 1976); Marine Constr. Dredging, Inc., ASBCA No. 38412, 95-1 BCA ¶ 27,286 (although government's administration of the contract was "seriously flawed," no bad faith).

B. Regulatory guidance. The FAR provides detailed procedures which the contracting officer should follow to terminate a contract.

1. Contracting officers should consider alternatives to termination. FAR 49.402-4. The following, among others, are available in lieu of termination for default when in the Government's interest:
  - (a) permit the contractor, the surety, or the guarantor, to continue performance under a revised schedule;
  - (b) permit the contractor to continue performance by means of a subcontract or other business arrangement;
  - (c) if the requirement no longer exists and the contractor is not liable to the government for damages, execute a no-cost termination.
2. The FAR provides detailed procedures for terminating a contract for default. FAR 49.402-3. When a default termination is being considered, the Government shall decide which termination action to take only after review by contracting and technical personnel, and by counsel, to ensure the propriety of the proposed action. Failure to conduct such a review, while risky, will not automatically overturn a default decision. National Med. Staffing, Inc., ASBCA No. 40391, 92-2 BCA ¶ 24,837 (contracting officer acted within her discretion despite her failure to consult with technical personnel and counsel prior to termination).
3. Before terminating a contractor for default, the contracting officer should comply with the pertinent notice requirements (cure notice or show cause notice). FAR 49.402-3(c)(d)(e). Additional notice to the following third parties may be required:

- a. Surety. If a notice to terminate for default appears imminent, the contracting officer shall provide a written notice to the surety. If the contractor is subsequently terminated, the contracting officer shall send a copy of the notice to the surety. FAR 49.402-3(e)(2).
  - b. Small Business Administration. When the contractor is a small business, send a copy of any show cause or cure notice to the contracting office's small business specialist and the Small Business Regional Office nearest the contractor. FAR 49.402-3(e)(4).
4. FAR 49.402-3(f) states that the contracting officer shall consider the following factors in determining whether to terminate a contract for default:
- a. The terms of the contract and applicable laws and regulations.
  - b. The specific failure of the contractor and the excuses for the failure.
  - c. The availability of the supplies or services from other sources.
  - d. The urgency of the need for the supplies or services and the period of time required to obtain them from other sources, as compared with the time delivery could be obtained from the delinquent contractor.
  - e. The degree of essentiality of the contractor in the Government acquisition program and the effect of a termination for default upon the contractor's capability as a supplier under other contracts.
  - f. The effect of a termination for default on the ability of the contractor to liquidate guaranteed loans, progress payments, or advance payments.
  - g. Any other pertinent facts and circumstances.



5. Failure of the contracting officer to consider factors at FAR 49.402-3(f) may result in a defective termination. See DCX, Inc., 79 F.3d 132 (Fed. Cir. 1996) (although contracting officer's failure to consider one or more FAR 49.402-3(f) factors does not automatically require conversion to termination for convenience, such failure may aid the court or board in determining whether the contracting officer abused his discretion); Phoenix Petroleum Company, ASBCA No. 42763, 96-2 BCA ¶ 28,284 (failure to analyze FAR factors does not entitle contractor to relief; factors are not a prerequisite to a valid termination).
6. Failure to consider all information available prior to issuing a termination notice could be an abuse of discretion. Jamco Constructors, Inc., VABCA No. 3271, 94-1 BCA ¶ 26,405, aff'd on recon., 94-2 BCA ¶ 26,792 (contracting officer abused discretion by failing to reconcile contradictory information and "blindly" accepting technical representative's estimates for completion of the contract by another contractor).
7. The contracting officer must explain the decision to terminate a contract for default in a memorandum for the contract file. FAR 49.402-5. The memorandum should recount the factors at FAR 49.402-3(f).
8. The Default Termination Notice.
  - (a) Contents of the termination notice. FAR 49.102; FAR 49.402-3(g). The written notice must clearly state:
    - (1) The contract number and date;
    - (2) The acts or omissions constituting the default;
    - (3) That the contractor's right to proceed further under the contract (or a specified portion of the contract) is terminated;
    - (4) That the supplies or services terminated may be purchased against the contractor's account, and that the contractor will be held liable for any excess costs;

- (5) If the contracting officer has determined that the failure to perform is not excusable, that the notice of termination constitutes such decision, and that the contractor has the right to appeal such decision under the Disputes clause;
  - (6) That the Government reserves all rights and remedies provided by law or under the contract, in addition to charging excess costs; and
  - (7) That the notice constitutes a decision that the contractor is in default as specified and that the contractor has the right to appeal under the Disputes clause. FAR 49.402-3(g).
  - (8) FAR 49.102(a) provides that the notice shall also include any special instructions and the steps the contractor should take to minimize the impact on personnel (including reduction in work force notice of FAR 49.601-2(g)).
- (b) A default termination is a final decision that can be appealed. Malone v. United States, 849 F.2d 1441 (Fed. Cir. 1988).
- (1) The termination notification must give notice to the contractor of right to appeal the default termination. Failure to properly advise the contractor of its appeal rights may prevent the “appeals clock” from starting if the contractor can show detrimental reliance. Decker & Co. v. West, 76 F.3d 1573 (Fed. Cir. 1996).
  - (2) When mailed, the notice shall be sent by certified mail, return receipt requested. When hand delivered, a written acknowledgement shall be obtained from the contractor. FAR 49.102(a). A default termination notice is effective when delivered to the contractor. Fred Schwartz, ASBCA No. 20724, 76-1 BCA ¶ 11,916.

## **VII. RIGHTS AND LIABILITIES ARISING FROM TERMINATIONS FOR DEFAULT.**

A. Contractor Liability. Upon termination of a contract, the contractor is liable to the government for any excess costs incurred in acquiring supplies or services similar to those terminated for default (see FAR 49.402-6) and for any other damages, whether or not repurchase is effected (see FAR 49.402-7). FAR 49.402-2(e).

### **1. Excess Reprocurement Costs.**

a. Under fixed-price supply and service contracts, the government can acquire supplies or services similar to those terminated and the contractor will be liable for any excess costs of those supplies or services. FAR 49.402-6; FAR 52.249-8(b); Ed Grimes, GSBCA No. 7652, 89-1 BCA ¶ 21,528.

b. The government must show that its assessment was proper by establishing the following:

(1) The reprocured supplies or services are the same as or similar to those involved in the termination. International Foods Retort Co., ASBCA No. 34954, 92-2 BCA ¶ 24,994.

(2) The government actually incurred excess costs. Sequal, Inc., ASBCA No. 30838, 88-1 BCA ¶ 20,382; and

(3) The government acted reasonably to minimize the excess costs resulting from the default. Daubert Chem. Co., ASBCA No. 46752, 94-2 BCA ¶ 26,741 (government acted reasonably where it reprocured quickly, obtained seven bids, and awarded to lowest bidder).

c. Mitigation of damages. The government has an affirmative duty to mitigate damages on repurchase. Ronald L. Collier, ASBCA No. 26972, 89-1 BCA ¶ 21,328; Kessler Chem., Inc., ASBCA No. 25293, 81-1 BCA ¶ 14,949.

- (1) If the repurchase is for a quantity of goods in excess of the quantity that was terminated for default, the contracting officer may not charge the defaulting contractor for excess costs beyond the undelivered quantity terminated for default. FAR 49.402-6(a).
  - (2) If a repurchase is for a quantity not in excess of the quantity that was terminated, the government shall repurchase at as reasonable a price as practicable. FAR 49.402-6(b). The KO may use any terms and acquisition method deemed appropriate for the repurchase. 52.249-8(b). See Al Bosgraaf Son's, ASBCA No. 45526, 94-2 BCA ¶ 26,913 (reprocurement by modification of another contract inadequate to mitigate costs); International Technology Corp., B-250377.5, Aug. 18, 1993, 93-2 CPD ¶ 102 (may award a reprocurement contract to the next-low offeror on the original solicitation when there is a short time span between the original competition and default).
  - (3) The government is not required to invite bids on repurchase solicitations from a defaulted contractor. Montage Inc., B-277923.2, Dec. 29, 1997, 97-2 CPD ¶ 176.
- d. When the repurchase is defective, the defaulting contractor may be relieved of liability for excess costs. Ross McDonald Contracting, GmbH, ASBCA No. 38154, 94-1 BCA ¶ 26,316 (government failed to mitigate damages when exercising option on reprocurement contract); Astra Prods. Co. of Tampa, ASBCA No. 24474, 82-1 BCA ¶ 15,497.
- e. The Fulford Doctrine. A contractor may dispute an underlying default termination as part of a timely appeal from a government demand for excess reprocurement costs, even though the contractor failed to appeal the underlying default termination in a timely manner. Fulford Mfg. Co., ASBCA No. 2143, 6 CCF ¶ 61,815 (May 20, 1955). Deep Joint Venture, GSBCA No. 14511, 02-2 BCA ¶ 31,914 (GSBCA confirms validity of the Fulford doctrine for post-CDA terminations). See D. Moody & Co. v. United States, 5 Cl. Ct. 70 (1984); Kellner Equip., Inc., ASBCA No. 26006, 82-2 BCA ¶ 16,077.

2. Liquidated Damages. Liquidated damages serve as a contractually agreed upon substitute for actual damages caused by late delivery or late completion of work. The government may recover both liquidated damages and an assessment of excess costs (either for reprocurement or for completion of the work) from a contractor upon terminating a contract for default. FAR 49.402-7.
  - a. The common law rule that liquidated damages will not be enforced if they constitute a penalty applies to government acquisitions. Southwest Eng'g Co. v. United States, 341 F.2d 998 (8th Cir. 1965).
  - b. A liquidated damages clause will be enforced as reasonable where, at the inception of the contract, the damages are based on a reasonable forecast of possible damages in the event of failure of performance. American Constr. Co., ENG BCA No. 5728, 91-2 BCA ¶ 24,009.
  - c. If a contract does not have a liquidated damages clause or if the liquidated damages provision of a contract is unenforceable because it is punitive, the government may recover actual damages to the extent that they are proved. FAR 52.249-10.
3. Common law damages.
  - a. The government may also recover common law damages, which may be in lieu of or in addition to excess costs assessed under the default termination clause. FAR 52.249-8(h); Cascade Pac. Int'l v. United States, 773 F.2d 287 (Fed. Cir. 1985) (government awarded common law damages after failing to prove excess reprocurement costs); Hideca Trading, Inc., ASBCA No. 24161, 87-3 BCA ¶ 20,040 (despite failure to reprocore, government entitled to damages at the difference between the contract price and the market price for oil for the period 60 to 90 days after the default termination).

- b. The government has the burden of proving that the damages are foreseeable, direct, material, or the proximate result of the contractor's breach of contract. ERG Consultants, Inc., VABCA No. 3223, 92-2 BCA ¶ 24,905 (damages must be foreseeable); Gibson Forestry, AGBCA No. 87-325-1, 91-2 BCA ¶ 23,874.
4. Unliquidated advance and progress payments. The government is entitled to repayment by the contractor of advance and progress payments, if any, attributable to the undelivered work. Smith Aircraft Co., ASBCA No. 39316, 90-1 BCA ¶ 22,475.

B. The Government's Liabilities.

1. Upon termination of a fixed-price supply contract for default, the government is liable only for the contract price for completed supplies delivered and accepted. FAR 52.249-8(f).
2. Upon termination of a fixed-price service contract or of a fixed-price construction contract, the government is liable only for the reasonable value of work done before termination, whether or not the services or construction have been contractually accepted by the government. Sphinx Int'l, Inc., ASBCA No. 38784, 90-3 BCA ¶ 22,952.
3. The government may also require the contractor to transfer title and deliver to the government its manufacturing materials, for which the government will pay the reasonable value. FAR 52.249-8(e); FAR 52.249-10(a).
4. Upon termination for default of a cost-reimbursement contract, the government is generally liable for all of the reasonable, allowable, and allocable costs incurred by the contractor, whether or not accepted by the government, plus a percentage of the contract fee. The fee is somewhat limited, however, as the amount of the contract fee payable to the contractor is based on the work accepted by the government, rather than on the amount of work done by the contractor. FAR 52.249-6.

## **VIII. TERMINATION OF COMMERCIAL ITEM CONTRACTS: “TERMINATION FOR CAUSE”**

- A. Background. The Federal Acquisition Streamlining Act, P.L. 103-355, 108 Stat. 3243 (Oct. 13, 1994), established special requirements for the acquisition of commercial items. Congress intended government acquisitions to more closely resemble those customarily used in the commercial market place. FAR 12.201.
- B. Applicable Rules for Terminations for Cause. The clause at FAR 52.212-4 permits the government to terminate a contract for a commercial item for cause. This clause contains concepts that are in some ways different from “traditional” termination rules contained in FAR Part 49. Consequently, the requirements of FAR Part 49 do not apply when terminating contracts for commercial items. Contracting officers, however, may continue to follow Part 49 as guidance to the extent that Part 49 does not conflict with FAR 12.403 and FAR 52.212-4. FAR 12.403(a).
- C. Policy. The contracting officer should exercise the government’s right to terminate a contract for a commercial item only when such a termination would be in the best interests of the government. Further, the contracting officer should consult counsel prior to terminating for cause. FAR 12.403(b).
- D. Termination for Cause Highlights. FAR 12.403; FAR 52.212-4.
  - 1. Grounds. Under the rules, a contractor may be terminated for cause “in the event of any default by the Contractor, or if the Contractor fails to comply with any contract terms or conditions, or fails to provide the government, upon request, with adequate assurances of future performance.” FAR 52.212-4(m).
  - 2. Excusable Delay. Contractors are required to notify contracting officers as soon as reasonably possible after the commencement of excusable delay. FAR 52.212-4(f). In most situations, this requirement should eliminate the need for a show cause notice prior to terminating a contract. FAR 12.403(c).

3. Rights and Remedies:

- a. The government's rights and remedies after a termination for cause shall include all the remedies available to any buyer in the commercial market place. The government's preferred remedy will be to acquire similar items from another contractor and to charge the defaulted contractor with any excess procurement costs together with any incidental or consequential damages incurred because of the termination. FAR 12.403(c)(2).
  - b. In the event of a termination for cause, the Government shall not be liable for supplies or services not accepted. FAR 52.212-4(m).
  - c. If a Board determines that the government improperly terminated for cause, such termination will be deemed a termination for convenience. FAR 52.212-4(m).
4. Procedure to terminate for cause. The CO shall send the contractor written notification. FAR 12.403(c)(3).

**IX. MISCELLANEOUS.**

A. Portion of the Contract That May Be Terminated for Default.

- 1. Total or partial termination. A default termination may be total or partial. FAR 52.249-8(a)(1); Balimoy Mfg. Co. of Venice v. United States, 2000 U.S. App. LEXIS 26702 (Fed. Cir 2000).
- 2. Severable contract requirements. Where a contract includes severable undertakings, default on one effort may not justify termination of the entire contract. T.C. Sarah C. Bell, ENG BCA No. 5872, 92-3 BCA ¶ 25,076.



- B. Availability of Funds. Funds that have been obligated but have not been disbursed at the time of termination for default and funds recovered as excess costs on a defaulted contract remain available for a replacement contract awarded in a subsequent fiscal year. Funding of Replacement Contracts, B-198074, July 15, 1981, 81-2 CPD ¶ 33; Bureau of Prisons-Disposition of Funds Paid in Settlement of Breach of Contract Action, B-210160, Sep. 28, 1983, 84-1 CPD ¶ 91.
- C. Conversion to T4C. All FAR default clauses provide that an erroneous default termination will be converted to a termination for convenience. FAR 52.249-8(g); FAR 52.249-10(c); FAR 52.249-6(b). But see Apex Int'l Mgmt. Servs., Inc., ASBCA No. 38087, 94-2 BCA ¶ 26,842 (board refuses to limit recovery to termination for convenience costs where government officials acted in bad faith; contractor entitled to breach damages).
- D. T4C Proposals while T4D appeal is pending.
1. A contractor, prior to the default being overturned, can submit a termination for convenience settlement proposal to the contracting officer. The proposals will be treated as Contract Disputes Act claims.<sup>2</sup> McDonnell Douglas Corp. v. United States, 37 Fed. Cl. 285 (1997); Balimoy Mfg. Co. of Venice, ASBCA No. 49,730, 96-2 BCA ¶ 28,605.
  2. An appeal of a convenience settlement proposal will be dismissed without prejudice to reinstatement if the appeal of a default termination is pending. Poly Design, Inc., ASBCA No. 50862, 98-1 BCA ¶ 29,458.

## **X. CONCLUSION.**

---

<sup>2</sup> The demand for termination for convenience costs from the contracting officer who terminated the contract for default demonstrates the "impasse" required to convert a proposal into a claim.



## **CHAPTER 20**

### **PROCUREMENT FRAUD**

I. INTRODUCTION.....	1
II. TYPES OF FRAUD.....	1
A. Defective Product/Product Substitution .....	1
B. Defective Testing.....	1
C. Bid-Rigging .....	1
D. Bribery and Public Corruption. ....	2
E. Defective Pricing.....	2
F. False Invoices .....	2
III. GOVERNMENT POLICY FOR COMBATTING FRAUD. ....	2
A. Department of Justice (DOJ) Policy.....	2
B. Department of Defense (DOD) Policy.....	2
IV. PLAYERS INVOLVED IN FRAUD ABATEMENT.....	3
A. DOD Inspector General. ....	3
B. Military Criminal Investigative Organizations. ....	3
C. Department of Justice. ....	4
D. Procurement Fraud Division (PFD).....	4
E. Procurement Fraud Advisors .....	4
V. CONTRACTING OFFICER AUTHORITY. ....	4
A. Actions Clearly Exceeding KO Authority.....	4
B. Actions Clearly Within KO Authority.....	4
VI. REPORTING REQUIREMENTS .....	5

A. Indicators of Fraud.....	5
B. Upon Receiving Indicators of Procurement Fraud .....	6
VII. CRIMINAL STATUTES .....	7
A. Conspiracy to Defraud.....	7
B. False Claims.....	7
C. False Statements. ....	8
D. Mail Fraud and Wire Fraud. ....	9
E. Major Fraud Act.....	9
F. Title 10 (U.C.M.J.).....	10
VIII. CIVIL REMEDIES .....	10
A. The Civil False Claims Act.. ....	10
B. Liability Under the False Claims Act .....	10
C. Damages.....	11
D. Civil Penalties .....	12
IX. THE QUI TAM PROVISIONS OF THE FALSE CLAIMS ACT.....	12
X. ADMINISTRATIVE REMEDIES. ....	15
A. Basics.....	15
B. Debarment.....	15
C. Suspension. ....	17
D. Effect of Debarment or Suspension.....	18
E. Period of Debarment. ....	19
F. Period of Suspension. ....	19
XI. CONTRACTUAL REMEDIES.....	20

A. Historical Right.....	20
B. Denial of Claims. ....	21
C. Countercalims Under the CDA.....	21
D. Default Terminations Based on Fraud.....	21
E. Voiding Contracts Pursuant to FAR 3.7 .....	23
F. Suspending Payments Upon a Finding of Fraud, FAR 32.006 .....	23
G. Voiding Contracts Pursuant to the Gratuities Clause, FAR 52.203-3 .....	24
XII. BOARD'S OF CONTRACT APPEAL TREATMENT OF FRAUD.....	25
A. Jurisdiction.....	25
B. Dismissals, Suspensions and Stays.....	25
C. Fraud as an Affirmative Defense .....	26
XIII. CONCLUSION.....	26

## **CHAPTER 20**

### **PROCUREMENT FRAUD**

#### **I. INTRODUCTION.**

“The United States does not stand on the same footing as an individual in a suit to annul a deed or lease obtained from him by fraud. . . . The financial element in the transaction is not the sole or principle thing involved. This suit was brought to vindicate the policy of the Government. . . . The petitioners stand as wrongdoers, and no equity arises in their favor to prevent granting the relief sought by the United States.” Pan Am. Petroleum and Transp. v. United States, 273 U.S. 456, 509 (1927).

#### **II. TYPES OF FRAUD.**

- A. Defective Product/Product Substitution: These terms generally refer to cases where contractors deliver to the Government goods which do not conform to contract requirements without informing the Government. United States v. Hoffman, 62 F. 3d 1418 (6<sup>th</sup> Cir. 1995).
- B. Defective Testing: This subset of defective products cases results from the failure of a contractor to perform contractually required tests, or its failure to perform such testing in the required manner.
- C. Bid-Rigging: The absence of competition deprives the government of its most reliable measure of what the price should have been. Measure of damages is “the difference between what the government actually paid on the fraudulent claim and what it would have paid had there been fair, open and competitive bidding.” United States v. Killough, 848 F.2d 1523, 1532 (11<sup>th</sup> Cir. 1988); see also Brown v. United States, 524 F.2d 693, 706 (1975); United States v. Porat, 17 F.3d 660 (3<sup>rd</sup> Cir. 1993).

- D. Bribery and Public Corruption: The breach of an employee's duty of loyalty. See, e.g., United States v. Carter, 217 U.S. 286 (1910); United States v. Brewster, 408 U.S. 501 (1972).
- E. Defective Pricing: The Truth in Negotiations Act ("TINA"), 10 U.S.C. § 2306a, together with its implementing regulations, 48 C.F.R. § 15.8 et seq. ("Price Negotiation"), requires contractors in certain negotiated procurements to disclose and certify that disclosed details concerning expected costs ("cost or pricing data") are accurate, current and complete. A perceived or actual violation of TINA may serve as the predicate for a fraud investigation and civil or criminal prosecution by the Government. United States v. Broderson, 67 F. 3d 452 (2d Cir. 1995).
- F. False Invoices. Shaw v. AAA Engineering & Drafting, Inc., 213 F.3d 545 (10th Cir. 2000) (Monthly invoices submitted when the contractor was knowingly not complying with contract terms can be the basis of False Claims Act liability. A claimant can premise a claim on a "false implied certification of contractual compliance.")

### **III. GOVERNMENT POLICY FOR COMBATTING PROCUREMENT FRAUD.**

- A. Department of Justice (DOJ) Policy. DOJ policy requires the coordination of parallel criminal, civil, and administrative proceedings so as to maximize the government's ability to obtain favorable results in cases involving procurement fraud. See U.S. Dep't of Justice, U.S. Att'ys Man. ch. 1-12.000 (Coordination of Parallel Criminal, Civil, and Administrative Proceedings) June 1998.
- B. Department of Defense (DOD) Policy. DOD policy requires the coordinated use of criminal, civil, administrative, and contractual remedies in suspected cases involving procurement fraud. See U.S. DEPT OF DEFENSE, DIR. 7050.5, COORDINATION OF REMEDIES FOR FRAUD AND CORRUPTION RELATED TO PROCUREMENT ACTIVITIES (7 June 1989); U.S. DEP'T OF ARMY, REG. 27-40, LITIGATION, 19 Sept. 1994; U.S. DEP'T OF AIR FORCE, DIR. 51-11, COORDINATION OF REMEDIES FOR FRAUD AND CORRUPTION RELATED TO AIR FORCE PROCUREMENT MATTERS, 21 Oct. 1994; U.S. DEP'T OF NAVY, INST. 5430.92A, OP-008, ASSIGNMENT OF RESPONSIBILITIES TO COUNTERACT FRAUD, WASTE, AND RELATED IMPROPRIETIES WITHIN THE DEPARTMENT OF THE NAVY, (20 Aug. 1987).

1. DOD policy requires each department to establish a centralized organization to monitor all significant fraud and corruption cases.
2. Definition of a “significant” case.
  - a. All fraud cases involving an alleged loss of \$100,000 or more.
  - b. All corruption cases that involve bribery, gratuities, or conflicts of interest.
  - c. All investigations into defective products or product substitution in which a serious hazard to health, safety, or operational readiness is indicated (regardless of loss value).
3. Each centralized organization monitors all significant cases to ensure that all proper and effective criminal, civil, administrative, and contractual remedies are considered and pursued in a timely manner.
4. Product Substitution/Defective Product cases receive special attention.
5. DOD Voluntary Disclosure Program. DOD IG Pamphlet IGDPH 5505.50, Voluntary Disclosure Program—A Description of the Process (April, 1990).

#### **IV. PLAYERS INVOLVED IN FRAUD ABATEMENT.**

- A. DOD Inspector General. Inspector General Act of 1978, Pub. L. 95-452, as amended by Pub. L. No. 97-252; DOD Dir. 5106.1, Inspector General of Department of Defense (Mar. 14, 1983).
- B. Military Criminal Investigative Organizations.



- C. Department of Justice. DOD Dir. 5525.7, Memorandum of Understanding Between Department of Defense and Department of Justice Relating to the Investigation and Prosecution of Certain Crimes (Jan. 22, 1985).
- D. Procurement Fraud Division (PFD), USALSA. AR 27-40, Litigation, Ch. 8.
- E. Procurement Fraud Advisors (PFA) (subordinate commands) - ensure that commanders and contracting officers pursue, in a timely manner, all applicable criminal, civil, contractual, and administrative remedies.

## **V. CONTRACTING OFFICER AUTHORITY.**

- A. Actions Clearly Exceeding KO Authority. The Contract Disputes Act, 41 U.S.C. § 605(a), as implemented by FAR 33.210, prohibits any contracting officer or agency head from settling, paying, compromising or otherwise adjusting any claim involving fraud.
- B. Actions Clearly Within KO Authority.
  - 1. Refusing Payment. It is the plain duty of administrative, accounting, and auditing officials of the government to refuse approval and to prevent payment of public monies under any agreement on behalf of the United States as to which there is a reasonable suspicion of irregularity, collusion, or fraud, thus reserving the matter for scrutiny in the courts when the facts may be judicially determined upon sworn testimony and competent evidence and a forfeiture declared or other appropriate action taken. To the Secretary of the Army, B-154766, 44 Comp. Gen. 111 (1964).
  - 2. Suspend Progress Payments. 10 U.S.C. § 2307(e)(2); Brown v. United States, 207 Ct. Cl. 768, 524 F.2d 693 (1975); Fidelity Construction, DOT CAB No. 1113, 80-2 BCA ¶ 14,819.
  - 3. Withhold Payment.

- a. When a debarment/suspension report recommends debarment or suspension based on fraud or criminal conduct involving a current contract, all funds becoming due on that contract shall be withheld unless directed otherwise by the Head of the Contracting Activity (HCA) or the Commander, U.S. Army Legal Services Agency. AFARS 9.406-3.
- b. Labor standards statutes provide for withholding for labor standards violations. WHA – 41 U.S.C. § 36; DBA – 40 U.S.C. § 276a-2; SCA – 41 U.S.C. § 353(a).
- c. Specific contract provisions may provide for withholding (e.g., service contract deductions for deficiencies in performance).
- d. Terminate Negotiations. FAR 49.106 (terminate settlement discussions regarding a terminated contract upon suspicion of fraud); K&R Eng'g Co., Inc., v. United States, 222 Ct. Cl. 340, 616 F.2d 469 (1980).
- e. Determine Contractor to be Nonresponsible. FAR Subpart 9.4.

## **VI. REPORTING REQUIREMENTS.**

- A. Indicators of Fraud. Indicators of Fraud in DOD Procurement, IG, DOD 4075.1-H (June 1987). Common examples include:
  - 1. Anticompetitive Activities. 15 U.S.C. § 1.
  - 2. False Statements. 18 U.S.C. § 1001.
  - 3. False Claims. 18 U.S.C. § 287.

- B. Upon receiving or uncovering substantial indications of procurement fraud:
1. PFA should report the matter promptly to their supporting Army Criminal Investigation Command (USACIDC) element.
  2. In such cases, the PFA must also submit a “Procurement Flash Report” to PFD. The flash report should contain the following information:
    - a. Name and address of contractor;
    - b. Known subsidiaries of parent firms;
    - c. Contracts involved in potential fraud;
    - d. Nature of the potential fraud;
    - e. Summary of the pertinent facts; and
    - f. Possible damages.
  3. DFARS 209.406-3 Report. The contracting officer is also required to submit an investigative-referral report.
  4. Remedies Plan. In significant cases, the PFA must prepare a comprehensive remedies plan. The remedies plan should include the following:
    - a. Summary of allegations;
    - b. Statement of adverse impact on DOD mission;
    - c. Statement of impact upon combat readiness and safety of DA personnel; and

- d. Consideration of each criminal, civil, contractual, and administrative remedy available.
- 5. Litigation Report. If the PFA determines that a civil proceeding, such as under the Civil False Claims Act, may be appropriate, the PFA should consult PFD to determine if a litigation report is necessary.

## **VII. CRIMINAL STATUTES.**

- A. Conspiracy to Defraud, 18 U.S.C. § 286 (with claims) and 18 U.S.C. § 371 (in general). The general elements of a conspiracy under either statute include:
  - 1. Knowing agreement by two or more persons which has as its object the commission of a criminal offense, or to defraud the United States; United States v. Upton, 91 F.3<sup>rd</sup> 677 (5<sup>th</sup> Cir. 1996);
  - 2. Intentional and actual participation in the conspiracy; and
  - 3. Performance by one or more of the conspirators of an overt act in furtherance of the unlawful goal. United States v. Falcone, 311 U.S. 205, 210-211 (1940); United States v. Richmond, 700 U.S. 1183, 1190 (8<sup>th</sup> Cir. 1983).
- B. False Claims, 18 U.S.C. § 287.
  - 1. The elements required for a conviction under Section 287 include:
    - a. Proof of a claim for money or property, which is false, fictitious, or fraudulent and material.
    - b. Made or presented against a department or agency of the United States; and

- c. Submitted with a specific intent to violate the law or with a consciousness of wrongdoing, i.e., the person must know at the time that the claim is false, fictitious, or fraudulent. See generally United States v. Slocum, 708 F.2d 587, 596 (11<sup>th</sup> Cir. 1983) (citing United States v. Computer Sciences Corp., 511 F. Supp. 1125, 1134 (E.D. Va. 1981), rev'd on other grounds, 689 F.2d 1181 (4<sup>th</sup> Cir. 1981)) (false indemnity claims made to USDA).
2. It is of no significance to a prosecution under section 287 that the claim was not paid. United States v. Coachman, 727 F.2d 1293, 1302 (D.C. Cir.), cert. denied, 419 U.S. 1047 (1984).
- C. False Statements, 18 U.S.C. § 1001.
1. The elements include proof that:
    - a. The defendant made a statement or submitted a false entry. “Statement” has been interpreted to include oral and unsworn statements. United States v. Massey, 550 F.2d 300 (5<sup>th</sup> Cir.), on remand, 437 F. Supp. 843 (M.D. Fla. 1977).
    - b. The statement was false.
    - c. The statement concerned a matter within the jurisdiction of a federal department or agency.
    - d. The government also must prove that a statement was “material.” The test of materiality is whether the natural and probable tendency of the statement would be to affect or influence governmental action. United States v. Lichenstein, 610 F.2d 1272, 1278 (5<sup>th</sup> Cir. 1980); United States v. Randazzo, 80 F. 3d 623, 630 (1<sup>st</sup> Cir. 1996); United States ex. Rel. Berge v. Board of Trustees University of Alabama, 104 F.3d 1453 (4<sup>th</sup> Cir. 1997).
    - e. Intent.

- (1) The required intent has been defined as “the intent to deprive someone of something by means of deceit.” United States v. Lichenstein, 610 F.2d 1272, 1277 (5<sup>th</sup> Cir. 1980).
- (2) A false statement must be knowingly made and willfully submitted. United States v. Guzman, 781 F.2d 428, (5<sup>th</sup> Cir. 1986).

D. Mail Fraud and Wire Fraud: 18 U.S.C. §§ 1341-43.

1. The essence of the mail fraud and wire fraud statutes is the use of mails or wire communications to execute a scheme to defraud the United States. Both statutes are broadly worded to prohibit the use of the mails or interstate telecommunications systems to further such schemes.
2. The elements of the two offenses are similar. Because the elements are similar, the cases interpreting the more recent wire fraud statute rely on the precedents interpreting mail fraud. See, e.g., United States v. Cusino, 694 F.2d 185 (9<sup>th</sup> Cir. 1982), cert. denied, 461 U.S. 932 (1983); United States v. Merlinger, 16 F. 3<sup>rd</sup> 670 (6<sup>th</sup> Cir. 1994). They include:
  - a. Formation of a scheme and artifice to defraud.
  - b. Use of either the mails or interstate wire transmissions in furtherance of the scheme. See United States v. Pintar, 630 F.2d 1270, 1280 (8<sup>th</sup> Cir. 1980) (mail fraud); United States v. Wise, 553 F.2d 1173 (8<sup>th</sup> Cir. 1977) (wire fraud).

E. Major Fraud Act. 18 U.S.C. § 1031.

1. The Act created a new criminal offense of “major fraud” against the United States. It is designed to deter major defense contractors from committing procurement fraud by imposing stiffer penalties and significantly higher fines.

2. Maximum Punishments: ten years confinement; fines are determined on a sliding scale based on certain aggravating factors. Basic Offense: \$1,000,000 per count. Government loss or contractor gain of \$500,000 or more: \$5,000,000. Conscious or reckless risk of serious personal injury: \$5,000,000. Multiple counts: \$10,000,000 per prosecution.
3. Elements:
  - a. Knowingly engaging in any scheme with intent to defraud the U.S. or to obtain money by false or fraudulent pretenses;
  - b. On a U.S. contract; and
  - c. Valued at \$1,000,000 or more. United States v. Brooks, 111 F.3d 365 (4<sup>th</sup> Cir. 1997). But see United States v. Nadi, 996 F.2d 548 (2<sup>nd</sup> Cir. 1993); United States v. Sain, 141 F.3d 463 (Fed. Cir. 1998).

F. Title 10 (UCMJ) Violations.

## VIII. CIVIL REMEDIES.

A. The Civil False Claims Act. 31 U.S.C. §§ 3729-33 (1988).

1. Background.
2. 1986 Amendments.
3. The primary litigation weapon for combating fraud is the Civil False Claims Act.

B. Liability Under the False Claims Act.

1. In General. 31 U.S.C. § 3729(a), imposes liability on any person (defined comprehensively in 18 U.S.C. § 1 (1988) to include “corporations, companies, associations, partnerships . . . as well as individuals”) who:

- a. Knowingly presents, or causes to be presented, to an officer or employee of the United States government or a member of the Armed Forces of the United States, a false or fraudulent claim for payment or approval. United States v. Krizek, 111 F.3d 934 (D.C. 1997).
- b. Conspires to defraud the government by having a false or fraudulent claim allowed or paid.
- c. Knowingly makes, uses, or causes to be made or used, a false record or statement to conceal, avoid, or decrease an obligation to pay or transmit money or property to the United States.

C. Damages.

- 1. Treble Damages are the substantive measure of liability. 31 U.S.C. § 3729(a); United States v. Peters, 110 F.3d 66 (8<sup>th</sup> Cir. 1997). Voluntary disclosures of the violation prior to the investigation, preclude the imposition of treble damages.
- 2. Different Scenarios.
  - a. Defective Products.
  - b. Defective Testing.
  - c. Bid-Rigging.
  - d. Bribery and Public Corruption.

D. Civil Penalties.



1. A civil penalty of between \$5,500 and \$11,000 per false claim. 31 U.S.C. § 3729. Imposition is “automatic and mandatory for each false claim.” S. Rep No. 345 at 8-10. See also United States v. Hughes, 585 F.2d 284, 286 (7<sup>th</sup> Cir. 1978) (“[t]his forfeiture provision is mandatory; it leaves the trial court without discretion to alter the statutory amount.”)
2. There is no requirement for the United States to prove that it suffered any damages. Fleming v. United States, 336 F.2d 475, 480 (10<sup>th</sup> Cir. 1964), cert. denied, 380 U.S. 907 (1965). The government also does not have to show that it made any payments pursuant to false claims. United States v. American Precision Products Corp., 115 F. Supp. 823 (D.N.J. 1953).
3. United States v. Halper, 490 U.S. 435 (1989): Defendant faced aggregated penalties of \$130,000 for fraud, which had damaged the government in the amount of \$585. A civil sanction, in application, may be so divorced from any remedial goal as to constitute punishment under some circumstances. The scope of the holding is a narrow one, addressed to “the rare case . . . where a fixed-penalty provision subjects a small-gauge offender to a sanction overwhelmingly disproportionate to the damages he has caused.” See United States v. Hatfield, 108 F.3d 67 (4<sup>th</sup> Cir. 1997).

## **IX. THE QUI TAM PROVISIONS OF THE FALSE CLAIMS ACT.**

### Background.

1. “Qui tam pro domino rege quam pro se ipso in hac parte sequitur.” (“Who as well for the King as for himself sues in this matter.”)
2. Overview of the Process.
  - a. The Civil False Claims Act authorizes an individual, acting as a private attorney general, to bring suit in the name of the United States. 31 U.S.C. § 3730. The statute gives the Government 60 days to decide whether to join the action. If the Government joins the action, the Government conducts the action. If the Government decides not to join the suit, the individual (known as the “qui tam relator” conducts the action.

- b. As an inducement to be a whistleblower, the statute provides that relators are entitled to portions of any judgment against the defendant. 31 U.S.C. § 3730(d).
- c. If the government joins and conducts the suit, the relator is entitled to between 15 and 25 percent of judgment, depending on the relator's contribution to the success of the suit.
- d. If the Government declines to join and the relator conducts the suit, the relator is entitled to between 25 and 30 percent of the judgment, at the discretion of the court.
- e. Limitations on Relators. 31 U.S.C. § 3730(e)(4) significantly limits a person's ability to become a qui tam relator by providing that no court will have jurisdiction over an action "based on the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accountability Office report, hearing, audit or investigation, or from the news media" unless the person bringing the action is an "original source" of the information. The statute defines "original source" as an individual who has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the Government before filing an action based on the information.

3. Qui Tam Litigation is a Growth Industry.

4. Qui Tam Developments.

- a. Hughes Aircraft Company v. United States ex rel. Schumer, 520 U.S. 939 (1997). The first United States Supreme Court case to address the qui tam provisions since the 1986 Amendments.
- b. Bly-Magee v. California, 236 F.3d 1014 (9<sup>th</sup> Cir. 2001). FCA claim viable without proof of government injury; state employees liable for acts beyond official duties.

- c. Searcy v. Philips Electronics North America Corp., 117 F.3d 154 (5<sup>th</sup> Cir. 1997). Federal Circuits split on government's unlimited right to veto qui tam settlements. See Killingsworth v. Northrop Corp., 25 F.3d 715 (9<sup>th</sup> Cir. 1994); United States ex rel Doyle v. Health Possibilities, P.S.C., 207 F.3d 335 (6<sup>th</sup> Cir. 2000).
- d. United States, ex rel. Dhawan v. New York City Health & Hosp. Corp., 2000 U.S. Dist. LEXIS 15,677 (S.D.N.Y. Oct. 27, 2000). Prior state court litigation resulted in public disclosure of FCA allegations.
- e. United States, ex rel. Summit v. Michael Baker Corp., 40 F. Supp. 2d 772 (E.D. Va. 1999) (the court held that a qui tam relator may settle his retaliation claim under the FCA).
- f. United States, ex rel. Stevens v. Vermont Agency of Natural Resources, 120 S.Ct. 1858 (2000) (A private individual may not bring suit in federal court on behalf of the United States against a state or state agency under the False Claims Act). See also Galvan v. Federal Prison Indus., Inc., 199 F.3d 461 (D.C. Cir. 1999) (Sovereign immunity bars qui tam suit against government corporation).
- g. Cook County v. United States ex rel. Chandler, 123 S. Ct. 1239 (2003) (a municipality is a "person" subject to suit under the FCA).
- h. United States, ex rel. Riley v. St. Luke's Episcopal Hospital, 196 F.3d 514 (5<sup>th</sup> Cir. 1999), *rev'd and remanded en banc*, 252 F.3d 749 (5<sup>th</sup> Cir. 2001) (qui tam does not violate the "Take Care" and separation of powers provisions of the Constitution).
- i. United States, ex rel Thorton v. Science Applications Int'l Corp., 207 F.3d 769 (5<sup>th</sup> Cir. 2000) (the value of administrative claims released by a contractor pursuant to a FCA settlement with the government are part of the settlement "proceeds" that the government must share with the relator).

- j. United States ex rel Holmes v. Consumer Insurance Group, 318 F.3d 1199 (10 Cir. 2003) (en blanc) (federal employee could be a qui tam plaintiff).

## **X. ADMINISTRATIVE REMEDIES.**

### **A. Debarment and Suspension Basics. 10 U.S.C. § 2393; FAR Subpart 9.4.**

- 1. Suspension. Action taken by a suspending official to disqualify a contractor temporarily from Government contracting.
- 2. Debarment. Action taken by a debarring official to exclude a contractor from Government contracting for a specified period.
- 3. Government policy is to solicit offers from, award contracts to, and consent to subcontracts with responsible contractors only.
- 4. Debarment and suspension are discretionary administrative actions to effectuate this policy and shall not be used for punishment. FAR 9.103(a); FAR 9.402; United States v. Glymp, 96 F.3d 722, 724 (4<sup>th</sup> Cir. 1996).
- 5. Debarring and suspending officials. DFARS 209.403. Any person may refer a matter to the agency debarring official. However, the absence of a referral will not preclude the debarring official from initiating the debarment or suspension process or from making a final decision. 64 Fed. Reg. 62984 (Nov. 18, 1999).

### **B. Debarment. Causes for debarment. FAR 9.406-2. DFARS 209.406-2.**

- 1. Debarring official may debar a contractor for a **CONVICTION** of or **CIVIL JUDGMENT** for:
  - a. Commission of fraud or a criminal offense in connection with (i) obtaining, (ii) attempting to obtain, or (iii) performing a public contract or subcontract.

- b. Violation of federal or state antitrust statutes relating to the submission of offers.
  - c. Commission of embezzlement, theft, forgery, bribery, falsification or destruction of records, making false statements, or receiving stolen property.
  - d. Commission of any other offense indicating a lack of business integrity or business honesty that seriously and directly affects the present responsibility of a government contractor or subcontractor.
  - e. Criminal conviction for affixing “Made in America” labels to non-American goods.
  - f. Unfair trade practices.
2. Debarring official may debar a contractor, based upon a **PREPONDERANCE OF THE EVIDENCE** for:
- a. Violation of the terms of a government contract or subcontract so serious as to justify debarment, such as
    - (1) Willful failure to perform in accordance with the terms of one or more contracts.
    - (2) A history of failure to perform, or unsatisfactory performance of, one or more contracts.
    - (3) Violation of the Drug-Free Workplace Act of 1988, Pub. L. No. 100-690, 102 Stat. 4181.
    - (4) Any other cause of so serious or compelling a nature that it affects the present responsibility of a government contractor or subcontractor.

- b. “Preponderance” means proof by information that, compared with that opposing it, leads to the conclusion that the fact at issue is more probably true than not. FAR 9.403. See Imco, Inc. v. United States, 33 Fed. Cl. 312 (1995).

C. Suspension. Causes for suspension. FAR 9.407-2.

1. Upon **ADEQUATE EVIDENCE** of:

- a. Commission of fraud or a criminal offense in connection with (i) obtaining, (ii) attempting to obtain, or (iii) performing a public contract or subcontract.
  - (1) Violation of federal or state antitrust statutes relating to the submission of offers.
  - (2) Commission of embezzlement, theft, forgery, bribery, falsification or destruction of records, making false statements, or receiving stolen property.
  - (3) Violation of the Drug-Free Workplace Act of 1988, Pub. L. No. 100-690, 102 Stat. 4181.
  - (4) Intentionally affixing a “Made in America” label to non-American goods.
  - (5) Unfair trade practices.
  - (6) Commission of any other offense indicating a lack of business integrity or business honesty that seriously and directly affects the present responsibility of a government contractor or subcontractor.
- b. “Adequate evidence” means information sufficient to support the reasonable belief that a particular act or omission has occurred. FAR 9.403.

- c. Indictment for any of the causes in paragraph a above constitutes “adequate evidence” for suspension. FAR 9.407-2.
- d. “Adequate evidence” may include allegations in a civil complaint filed by another federal agency. See SDA, Inc., B-253355, Aug. 24, 1993, 93-2 CPD ¶ 132.
- e. Upon adequate evidence, contractor may also be suspended for any other cause of so serious or compelling a nature that it affects the present responsibility of a government contractor or subcontractor. FAR 9.407-2.

D. Effect of Debarment or Suspension. FAR 9.405; DFARS 209.405.

- 1. Contractors proposed for debarment, suspended, or debarred may not receive government contracts, and agencies may not solicit offers from, award contracts to, or consent to subcontracts with these contractors, unless acquiring agency’s head or designee determines that there is a compelling reason for such action.
- 2. Bids received from any listed contractor are opened, entered on abstract of bids, and rejected unless there is a compelling reason for an exception.
- 3. Proposals, quotations, or offers from listed contractors shall not be evaluated, included in the competitive range, or discussions held unless there is a compelling reason for an exception.
- 4. As a result of § 2455 of the Federal Acquisition Streamlining Act of 1994, Pub. L. No. 103-355, 108 Stat. 3243 (1994), FAR 9.401 provides for government-wide effect of the debarment, proposed debarment, suspension, or any other exclusion of an entity from procurement OR nonprocurement activities.

E. Period of Debarment. FAR 9.406-4; DFARS 209.406-4.

1. Commensurate with the seriousness of the cause(s). Generally, debarment should not exceed three years except that debarment for violations of the Drug-Free Workplace Act of 1988, Pub. L. No. 100-690, 102 Stat. 1481, may be for five years. FAR 23.506.
2. Administrative record must include relevant findings as to the appropriateness of the length of the debarment. Coccia v. Defense Logistics Agency, C.A. No. 89-6544, 1990 U.S. Dist. LEXIS 6079, (E.D. Pa. May 15, 1990). (Upholding 15-year debarment of former government employee convicted of taking bribes and kickbacks from contractors in exchange for contracts.)
3. The period of the proposed debarment, or any prior suspension, is considered in determining period of debarment.
4. Debarment period may be extended, but not solely on the original basis. If extension is necessary, normal procedures apply.
5. Period may be reduced (new evidence, reversal of conviction or judgment, elimination of causes, bona fide change in management).
6. Inconsistent treatment of corporate officials justifies overturning debarment decision. Kisser v. Kemp, 786 F. Supp. 38 (D.D.C. 1992).

F. Period of Suspension. FAR 9.407-4.

1. Suspension is temporary, pending completion of investigation or any ensuing legal proceedings.
2. If legal proceedings are not initiated within 12 months after the date of the suspension notice, terminate the suspension unless an Assistant Attorney General requests extension.
3. Extension upon request by an Assistant Attorney General shall not exceed 6 months.
4. Suspension may not exceed 18 months unless legal proceedings are initiated within that period.



## **XI. CONTRACTUAL REMEDIES.**

### **A. Historical Right.**

1. Under common law, where a party to a contract committed an act of fraud affecting a material element of the contract, the fraudulent act constituted a breach on the part of the party committing the act. The innocent party could then, at its election, insist on continuation of contract performance, or void the contract. Once voided, the voiding party would be liable under equity to the other party for any benefit received. Stoffela v. Nugent, 217 U.S. 499 (1910); Diamond Coal Co. v. Payne, 271 F. 362, 366 (App. D.C. 1921) (“equity refuses to give to the innocent party more than he is entitled to”).
2. Since the U. S. government was often viewed as acting in a “commercial capacity” when it engaged in commercial transactions, the rules of common law and equity applied to resolution of disputes. As such, if the government sought to rescind a contract, it was obligated to restore the contractor to the position it would be in, but-for the breach. Cooke v. United States, 91 U.S. 389, 398 (1875) (“If [the government] comes down from its position of sovereignty, and enters the domain of commerce, it submits itself to the same laws that govern individuals there.”); Hollerbach v. United States, 233 U.S. 165 (1914); United States v. Fuller Co., 296 F. 178 (1923).
3. The Supreme Court rejected the general rule that the government should be treated like any other party to a contract when fraud. Pan American Petroleum and Transport Co., v. United States, 273 U.S. 456 (1927).
4. Courts and boards have developed an implied or common-law right to terminate or cancel a contract in order to effectuate the public policy of protecting the government in instances of procurement fraud. See United States v. Mississippi Valley Generating Co., 364 U.S. 520, reh’g denied 365 U.S. 855 (1961); Four-Phase Sys., Inc., ASBCA No. 26794, 86-2 BCA ¶ 18,924.
5. A contractor that engages in fraud in dealing with the government commits a material breach, which justifies terminating the entire contract for default. Joseph Morton Co., Inc. v. United States, 3 Cl. Ct. 120 (1983), aff’d 757 F.2d 1273 (Fed. Cir. 1985).

B. Denial of Claims.

1. Section 605(a) of the CDA prohibits an agency head from settling, compromising or otherwise adjusting any claim involving fraud. 41 U.S.C.S § 605(a). This limitation is reflected in FAR 33.210, which states that the authority of a contracting officer to decide or resolve a claim does not extend to the “settlement, compromise, payment, or adjustment of any claim involving fraud.” Subpart 33.209 of the FAR further provides that contracting officers must refer all cases involving suspected fraud to the agency official responsible for investigating fraud.
2. As a practical matter, the term “denial” is a misnomer in that the contracting officer is precluded from making a final decision on a contractor’s claim where fraud is suspected. As such, denial of a claim consists simply of doing nothing with the claim while other courses of action are pursued.
3. Denial of a claim should be viewed as simply the first of possibly many steps in the resolution of a fraudulent claim.

C. Counterclaims Under the CDA

1. Per 41 U.S.C. § 604: “[i]f a contractor is unable to support any part of his claim and it is determined that such inability is attributable to misrepresentation of fact or fraud on the part of the contractor, he shall be liable to the Government for an amount equal to such unsupported part of the claim in addition to all costs to the Government attributable to the cost of reviewing said part of his claim.”
2. Until recently, this provision of the CDA has been applied in only a small number of cases. This may in part be due to the deterrent effect of this statute. See United States ex. ral. Wilson v. North American Const., 101 F. Supp.2d 500, 533 (S.D. Tex 2000) (district court unwilling to enforce this provision of the CDA because there were “very few cases applying 41 U.S.C. 604”). See also UMC Elecs. v. United States, 249 F.3d 1337 (Fed. Cir. 2001); Larry D. Barnes, Inc. (d/b/a TRI-AD Constructors) v. United States, 45 Fed. Appx. 907 (Fed. Cir. 2002) (provision successfully applied by CAFC).

3. It is not possible to enforce this section of the CDA in litigation before the boards because of the language at 41 U.S.C. Section 605 (a), which states: “[t]he authority of this subsection shall not extend to a claim or dispute for penalties or forfeitures prescribed by statute or regulation which another Federal agency is specifically authorized to administer, settle or determine.” The boards have generally interpreted this language as meaning only Department of Justice (DOJ) has the authority to initiated a claim under this provision. This is because (in the eyes of the boards) only DOJ has the authority to administer or settle disputes involving fraud under the current statutory scheme. See TDC Management, DOT BCA 1802, 90-1 BCA ¶ 22,627.

D. Default Terminations Based on Fraud.

1. Where a contractor challenges the propriety of a default termination before a court or board, the government is not precluded under the CDA from introducing evidence of fraud discovered after the default termination, and using that evidence to support the termination in the subsequent litigation.
2. Some grounds for default termination.
  - a. Submission of falsified test reports. Michael C. Avino, Inc., ASBCA No. 317542, 89-3 BCA ¶ 22,156.
  - b. Submission of forged performance and payment bonds. Dry Roof Corp., ASBCA No. 29061, 88-3 BCA ¶ 21,096.
  - c. Submission of falsified progress payment requests. Charles W. Daff, Trustee in Bankruptcy for Triad Microsystems, Inc. v. United States, 31 Fed. Cl. 682 (1994).

E. Voiding Contracts Pursuant to FAR 3.7

1. Subpart 3.7 of the FAR establishes a detailed mechanism for voiding and rescinding contracts where there has been either a final conviction for illegal conduct in relation to a government contract, or an agency head determination of misconduct by a preponderance of the evidence.

2. Authority to void a contract pursuant to Subpart 3.7 of the FAR is derived from:
  - a. 18 U.S.C. § 218;
  - b. Executive Order 12448, 50 Fed. Reg. 23,157 (May 31, 1985); and,
  - c. Subsection 27(e)(3) of the Office of Federal Procurement Policy Act (41 U.S.C. § 423).
3. Under this FAR provision, a federal agency shall consider rescinding a contract upon receiving information that a contractor has engaged in illegal conduct concerning the formation of a contract, or there has been a final conviction for any violation of 18 U.S.C. §§ 201-224.
4. The decision authority for this provision is the agency head, which for DOD has been delegated to the Under Secretary of Defense (Acquisition, Technology, and Logistics).
5. No recorded cases of this provision of the FAR being applied.

F. Suspending Payments Upon a Finding of Fraud, FAR 32.006.

1. FAR 32.006 allows an agency head to reduce or suspend payments to a contractor when the agency head determines there is “substantial evidence that the contractor’s request for advance, partial, or progress payments is based on fraud.”
2. The authority of the agency head under this provision may be delegated down to Level IV of the Executive Schedule, which for the Department of the Army is the Assistant Secretary of the Army for Acquisition, Logistics, and Technology (ASA (ALT)).

3. This provision of the FAR is a potentially powerful tool in that the government can stay payment of a claim without the danger of a board treating the claim as a deemed denial, thus forcing the government into a board proceeding before the government's case can be developed.
4. Only one recorded board decision involving this provision of the FAR. TRS Research, ASBCA No. 51712, 2001-1 BCA ¶ 31,149 (contracting officer suspended payment on invoices pending completion of an investigation involving fraud allegation, but failed to seek written permission from the agency head to take such action; ASBCA found the government in breach of the contract and sustained the appeal).

G. Voiding Contracts Pursuant to the Gratuities Clause, FAR 52.203-3.

1. Allows DOD to unilaterally void contracts upon an agency head finding that contract is tainted by an improper gratuity. Decision authority for the Department of the Army has been delegated to the ASA (ALT).
2. Authority stems from 10 U.S.C. § 2207, which requires the clause in all DOD contracts (except personal service contracts).
3. Considerable due process protections for the contractor.
4. Exemplary damages of between three to ten times the amount of the gratuity.
5. Procedures used very effectively in response to a fraudulent bidding scheme centered out of the Fuerth Regional Contracting Office, Fuerth, Germany. See Schuepferling GmbH & Co., ASBCA No. 45564, 98-1 BCA ¶ 29,659; ASBCA No. 45565, 98-2 BCA ¶ 29,739; ASBCA No. 45567, 98-2 BCA ¶ 29,828; Erwin Pfister General-Bauunternehmen, ASBCA Nos. 43980, 43981, 45569, 45570, 2001-2 BCA ¶ 31,431; Schneider Haustechnik GmbH, ASBCA Nos. 43969, 45568, 2001 BCA ¶ 31,264.

## **XII. BOARD'S OF CONTRACT APPEAL TREATMENT OF FRAUD.**

### **A. Jurisdiction.**

1. Theoretically, the boards are without jurisdiction to decide appeals tainted by fraud.
  - a. Under the CDA, “[e]ach agency board shall have jurisdiction to decide any appeal from a decision of a contracting officer (1) relative to a contract made by its agency, and (2) relative to a contract made by any other agency when such agency or the Administrator has designated the agency board to decide the appeal.” 41 U.S.C. § 607(d).
  - b. Because the CDA precludes contracting officers from issuing final decisions where fraud is suspected, and the boards only have jurisdiction over cases that can be decided by a contracting officer, the boards are effectively barred from adjudicating appeals involving fraud. See 41 U.S.C. § 605(a).
  - c. As a practical matter, the boards exercise a form a de facto jurisdiction in that a decision concerning a motion to dismiss an appeal for fraud will have a dispositive effect on the case.

### **B. Dismissals, Suspensions and Stays.**

1. Government must demonstrate that the possibility of fraud exists or that the alleged fraud adversely affects the Board's ability to ascertain the facts. Triax Co., Inc., ASBCA No. 33899, 88-3 BCA ¶ 20,830.
2. Mere allegations of fraud are not sufficient. General Constr. and Dev. Co., ASBCA No. 36138, 88-3 BCA ¶ 20,874. Four-Phase Systems, Inc., ASBCA No. 27487, 84-1 BCA ¶ 17,122.
3. Boards generally refuse to suspend proceedings except under the following limited circumstances:

- a. When an action has been commenced in a court of competent jurisdiction, by the handing down of an indictment or by filing of a civil action complaint, so that issues directly relevant to the claim before the board are placed before that court;
- b. When the Department of Justice or other authorized investigatory authority requests a suspension to avoid a conflict with an ongoing criminal investigation;
- c. When the government can demonstrate that there is a real possibility that fraud exists which is of such a nature as to effectively preclude the board from ascertaining the facts and circumstances surrounding a claim; and
- d. When an appellant so requests to avoid compromising his rights in regard to an actual or potential proceeding. See Fidelity Constr., 80-2 BCA ¶ 14,819 at 73,142.

C. Fraud as an Affirmative Defense.

- 1. Most often, the government elects to treat fraud as a jurisdictional bar, and pursues the issue in a motion to dismiss.
- 2. When fraud is cited as an affirmative defense, the boards generally treat the issue consistent with cases where it is presented as a jurisdictional bar. See ORC, Inc. ASBCA No. 49693, 97-1 BCA ¶ 28,750.

**XIII. CONCLUSION.**